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No. 90-1473

Supreme Court, U.S.
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In the

Supreme Court of the United States

OCTOBER TERM, 1990

JOANNE KOTLER, INDIVIDUALLY AND AS
ADMINISTRATRIX OF THE ESTATE OF
GEORGE P. KOTLER,
PETITIONER,
v.
THE AMERICAN TOBACCO COMPANY,
PHILIP MORRIS, INC. AND
LIGGETT GROUP, INC.,
RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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March 19, 1991

BATEMAN & SLADE, INC BOSTON, MASSACHUSETTS

QUESTIONS PRESENTED

1. Whether the Federal Cigarette Labeling and Advertising Act, which requires warning labels on cigarette packages and advertisements, preempts state common law tort claims based upon the adequacy of health warnings disseminated by cigarette manufacturers or the propriety of manufacturers' advertising practices.

2. Whether the Federal Cigarette Labeling and Advertising Act preempts state intentional tort claims based upon cigarette manufacturers' deception of consumers concerning the nature and extent of the health hazards of smoking.

3. Whether the petitioner is entitled to a new trial on the design defect and breach of warranty claims because the First Circuit Court of Appeals misconstrued Massachusetts products liability law in affirming the District Court's judgment and evidence presented at a trial involving the previously preempted claims could alter a jury's resolution of the case.

PARTIES

The petitioner for this writ of certiorari is Joanne Kotler individually and as Administratrix of the Estate of George P. Kotler. The respondents are The American Tobacco Company, Philip Morris, Inc. and Liggett Group, Inc. The petitioner was the appellant in the United States Court of Appeals for the First Circuit and the respondents were the appellees in that Court.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES iii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 4

A. Basis for Federal Jurisdiction 4

B. Factual Background 4

C. Procedural History 6

D. Preservation of Appellate Rights 7

REASONS FOR GRANTING THE WRIT 9

I. The Decision Of The First Circuit Court Of Appeals Is In Direct Conflict With Decisions Of Several State Appellate Courts 9

II. The Continued Vitality Of The Erroneous Analysis Of The Preemption Issue Is Depriving Potential Litigants Of The Opportunity To Pursue Their Common Law Rights 10

III. The Determination That The Labeling Act Preempts State Misrepresentation And Deceit Claims Establishes Unprecedented Tort Liability Protection For The Tobacco Industry 14

IV. Since The First Circuit Opinion Misconstrued Controlling State Law Precedents And Evidence

TABLE OF CONTENTS (cont.)

Presented At A Trial Involving The Previously Preempted Claims Could Alter The Jury's Evaluation Of The Claim The Petitioner Should Be Awarded A New Trial 15

A. The Court Erroneously Upheld The Dismissal Of The Petitioner's Risk-Utility Claims 15

B. The Court Erred In Affirming The Judgment For The Petitioner On Breach Of Warranty 17

CONCLUSION 19

TABLE OF AUTHORITIES

***Cases*:**

Anderson v. *Owens-Illinois, Inc.*, 799 F.2d 1 (1st Cir. 1986) 17

Back v. *Wickes Corp.*, 375 Mass. 633, 378 N.E.2d 964 (1978) 16

Barker v. *Lull Engineering Co., Inc.*, 20 Cal.3d 413, 573 P.2d 443 (1978) 16

Birdsong v. *Wrotenberry*, 901 F.2d 1270 (5th Cir. 1990) 8

Bishop v. *Wood*, 426 U.S. 341 (1976) 15, 16

Brandt v. *Schal Associates, Inc.*, 854 F.2d 948 (7th Cir. 1988) 8

Brockett v. *Spokane Arcades, Inc.*, 472 U.S. 491 (1985) 15, 16

TABLE OF AUTHORITIES (cont.)

Brown v. *Hotel Employees Int'l Union*, 468 U.S. 491 (1984) 12

C. A. May Marine Supply Co. v. *Brunswick Corp.*, 649 F.2d 1049 (5th Cir.), *cert. denied*, 454 U.S. 1125 (1981) 7

Carlisle v. *Philip Morris, Inc.*, (Tex. Ct. of Ap. 3d Dist. No. 3-89-175-CV decided February 6, 1991) 10, 13

Cipollone v. *Liggett Group, Inc.*, 893 F.2d 541 (3d Cir. 1990) 9

Cipollone v. *Liggett Group, Inc.*, 789 F.2d 181 (3d Cir. 1986), *cert. denied*, 479 U.S. 1043 (1987) 9, 12

Colter v. *Barber-Greene Co.*, 403 Mass. 50, 525 N.E. 2d 1305 (1988) 14

Dewey v. *R.J. Reynolds Tobacco Co.*, 121 N.J. 69, 577 A.2d 1239 (1990) 10, 13

English v. *General Electric Co.*, U.S. , 110 S.Ct. 2270 (1990) 12, 13

Farmer v. *United Brotherhood of Carpenters*, 430 U.S. 290 (1977) 12

Foman v. *Davis*, 371 U.S. 178 (1962) 8, 9

Forster v. *R. J. Reynolds Tobacco Co.*, 437 N.W.2d 655 (Minn. 1989) 9, 10, 14, 15

Goodyear Atomic Corp. v. *Miller*, 486 U.S. 174 (1988) 13

Hayes v. *Ariens*, 391 Mass. 407, 462 N.E.2d 273 (1984) 14, 17

Hillsborough County v. *Automated Medical Laboratories, Inc.*, 471 U.S. 707 (1985) 12

Killeen v. *Harmon Grain Products, Inc.*, 11 Mass. App. Ct. 20, 413 N.E.2d 767 (1980) 16

TABLE OF AUTHORITIES (cont.)

Kyte v. *Philip Morris, Inc.*, 408 Mass. 162, 556 N.E.2d 1025 (1990) 15, 16

Lynn v. *Sheet Metal Workers International Assoc.*, 804 F.2d 1472 (9th Cir. 1986), *aff'd*, 109 S.Ct. 639 (1989) 8

MacDonald v. *Ortho Pharmaceutical Corp.*, 394 Mass. 131, 475 N.E.2d 65, *cert. denied*, 474 U.S. 920 (1985) 13, 18

Palmer v. *Liggett Group, Inc.*, 825 F.2d 620 (1st Cir. 1987) 9, 12, 13

Pennington v. *Vistron Corp.*, 876 F.2d 414 (5th Cir. 1989) 9

Rice v. *Norman Williams Co.*, 458 U.S. 654 (1982) 13

Rice v. *Santa Fe Elevator Corp.*, 331 U.S. 218 (1947) 12

Roysdon v. *R. J Reynolds Tobacco Co.*, 849 F.2d 230 (6th Cir. 1988) 9

San Diego Bldg. Trades Council v. *Garmon*, 359 U.S. 236 (1959) 12

Silkwood v. *Kerr-McGee Corp.*, 464 U.S. 238 (1984) 13

Stephen v. *American Brands, Inc.*, 825 F.2d 312 (11th Cir. 1987) 9

Torres v. *Oakland Scavenger Co.*, 487 U.S. 312 (1988) 8

Uloth v. *City Tank Corp.*, 376 Mass. 874, 384 N.E.2d 1188 (1978) 16

***Statutes and Rules*:**

15 U.S.C. § 1331 2, 3

TABLE OF AUTHORITIES (cont.)

15 U.S.C. § 1333	2
15 U.S.C. § 1334	3
28 U.S.C. § 1254(1)	2
28 U.S.C. § 1332(a)(1)	4
United States Supreme Court Rules	
Rule 10(A)	10
Federal Rules of Appellate Procedure	
Rule 3(c)	8

***Miscellaneous*:**

Comment, *Common Law Claims Challenging Adequacy of Cigarette Warnings Preempted Under the Federal Cigarette Labeling and Advertising Act of 1965, Cipollone* v. *Liggett Group, Inc.*, 60 St. John's L. Rev. 754 (1986) 13

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit has not yet been reported. The opinions of the District Court upon which this appeal is based are reported at

685 F. Supp. 15 (D. Mass. 1988) and 731 F. Supp. 50 (D. Mass. 1990). All of the opinions are reprinted in the Appendix to this petition.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the First Circuit issued an opinion affirming the judgment of the District Court on December 19, 1990. Petitioner seeks review of this judgment pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The fundamental question raised by this case concerns the proper interpretation of the Federal Cigarette Labeling and Advertising Act (hereinafter, "Labeling Act"), 15 U.S.C. §§ 1331 *et seq.*, particularly the interface between that Act and state common law tort claims.

The Labeling Act mandated that effective January 1, 1966, every cigarette package contain a warning label calling consumers' attention to the potential health hazards of cigarette smoking, 15 U.S.C. § 1333. Congress specified the language of the warning and has twice since altered the wording to more explicitly call attention to the dangers of smoking.

The purpose of the Act is defined in § 1331 as follows:

> It is the policy of the Congress, and the purpose of this chapter, to establish a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health, whereby —

> (1) the public may be adequately informed that cigarette smoking may be hazardous to health by inclusion of a warning to that effect on each package of cigarettes; and
>
> (2) commerce and the national economy may be (A) protected to the maximum extent consistent with this declared policy and (B) not impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health.

The Act also contains a provision concerning preemption, 15 U.S.C. § 1334:

> (a) No statement relating to smoking and health, other than the statement required by section 1333 of this title, shall be required on any cigarette package.
>
> (b) No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter.

The court below has ruled that this provision proscribes any state tort action which depends on a showing that the labelling or advertising used by the cigarette manufacturers after the effective date of the Act was in any way inadequate or improper. The petitioner asserts that Congress could not have intended to grant cigarette manufacturers such a broad protection from liability and that therefore the tort claims brought in this case have not been preempted by the Act.

STATEMENT OF THE CASE

A. Basis For Federal Jurisdiction

The petitioner brought this diversity action in the United States District Court for Massachustts under 28 U.S.C. § 1332 (a)(1). The petitioner resides in Massachusetts and each of the three respondent corporations maintains its principal place of business in a state other than Massachusetts. The amount in controversy exceeds $50,000.00 excluding interest and costs.

B. Factual Background

George P. Kotler, who was born in 1931, began smoking Pall Mall cigarettes at age 11. Pall Malls are a product of the American Tobacco Company. He met the plaintiff Joanne Kotler in 1958 and they were married in 1961.

From the time they met, George Kotler was a regular smoker of Pall Malls. In 1967, he began smoking L & M's, a product of the Liggett Group, Inc. He occasionally smoked a few Pall Malls but primarily smoked L & M's for about three years. From that point on until his ultimate death in 1986, he smoked Benson & Hedges, a product of Philip Morris, Inc.

In October, 1984, Mr. Kotler was diagnosed with lung cancer. He died of lung cancer on January 11, 1986. His doctors opined that his long history of cigarette smoking caused the lung cancer which resulted in the death.

The petitioner's complaint contains counts of negligence, breach of warranty and negligent misrepresentation and/or deceit against all three respondent cigarette manufacturers and seeks recovery for pain and suffering, loss of earning capacity, medical expenses, wrongful death, loss of consortium and punitive damages. The petitioner alleges that the respondents

failed to adequately inform the petitoner's decedent that smoking was likely to be addictive and that cigarettes contained toxic and carcinogenic properties. Moreover, the respondents represented in their marketing and advertising that smoking was safe and desirable while they knew or should have known that smoking was likely to produce addiction and likely to be a substantial factor in causing serious personal injury and death.

The original district court preemption decision eliminated virtually all of the claims against Philip Morris, Inc. and Liggett Group, Inc. because George Kotler had not begun smoking their cigarettes until after 1965 (A. A50-A51, A59-A62). Following allowance of summary judgment for those respondents on the counts remaining against them, the case went to trial against the American Tobacco Company.

The petitioner introduced at trial expert testimony and documentary evidence that the health risks associated with smoking were known in the 1920's, 1930's and 1940's but that the respondent not only failed to warn users of the potential risk but actively sought to downplay any health concerns. The American Tobacco Company maintained until the time of trial the position that smoking was not injurious to health.

Robert K. Heimann, the former President of American Tobacco Company testified by videotape deposition that the alleged connection between smoking and cancer is a "reprehensible propaganda campaign based on spurious statistics that are socially irresponsible."

Experts testified that smoking is addictive and that as time goes on it becomes more difficult for an addicted smoker to permanently stop smoking. It was likely that if George Kotler and the public at large had received warnings about the health hazards of smoking in the 1940's and 1950's, he would have either stopped smoking or never started. His early smoking history was therefore a substantial factor in the ultimate development of cancer.

C. Procedural History

On March 7, 1986, the petitioner Joanne Kotler filed a complaint individually and as administratrix of the estate of George P. Kotler seeking damages in tort against the respondents, The American Tobacco Company, Philip Morris, Inc. and Liggett Group, Inc. The petitioner filed an Amended Complaint on April 25, 1986.

All three respondents moved to dismiss and for judgment on the pleadings on November 16, 1987. The Court, Skinner, J., allowed the motions in part and denied them in part by a memorandum and order entered March 16, 1988. He entered an amended memorandum and order on May 2, 1988.

On November 2, 1989 respondents Liggett Group, Inc. and Philip Morris, Inc. moved for summary judgment. On November 16, 1989 respondent American Tobacco Company moved for summary judgment. By memorandum and order dated November 21, 1989, the judge allowed the summary judgment motion of Liggett Group, Inc. and Philip Morris, Inc. On January 12, 1990, the judge allowed in part and denied in part American Tobacco Company's motion for summary judgment.

On February 12, 1990 trial began on the remaining counts against American Tobacco Company before Skinner, J. and a jury. At the conclusion of the petitioner's case, on February 28, 1990, the judge ordered a directed verdict on the count for breach of warranty but denied a directed verdict on the count for negligence. The evidence concluded on March 6, 1990. On March 7, 1990, after closing arguments of counsel and the charge by the judge, the case was submitted to the jury. On that same day, the jury returned a verdict for the respondent.

The Court entered judgment for Liggett Group, Inc. and Philip Morris, Inc. on March 26, 1990. The plaintiff filed Notices of Appeal on March 29, 1990 and April 24, 1990.

The First Circuit Court of Appeals consolidated the appeals and issued an opinion on December 19, 1990 affirming the judgments.

D. Preservation Of Appellate Rights

The respondents argued on appeal that the petitioner did not in her notice of appeal explicitly seek review of the District Court's ruling on preemption. The First Circuit did not resolve the issue but rather proceeded to address the merits of the claim since their conclusion on the merits was adverse to the petitioner (A. A4-A6).

Under the circumstances presented in this case, any ambiguity in the petitioner's notice of appeal should not preclude determination of this significant issue.

The relevant notice of appeal itself clearly specifies that the petitioner is appealing from "(4) the preclusion of the many theories of defective product, risk utility and/or consumer expectation as to Philip Morris and Liggett."

The judge's order on summary judgment made it clear that he believed he had disposed of these claims in his May, 1988 order (A. A50-A51). The order itself, however, was not so clear. Thus it was perfectly appropriate for the petitioner to specify the rulings which she was appealing in general terms rather than to specify from which order or combination of orders, they derived. The petitioner's intent to appeal all disposed claims is manifest.

Even if the notice itself was defective, "where claims or issues are inextricably intertwined, each may be reviewed even though not referred to in the notice of appeal" *C.A. May Marine Supply Co.* v. *Brunswick Corp.*, 649 F.2d 1049, 1056 (5th Cir.), *cert. denied*, 454 U.S. 1125 (1981). The respondents attacked all of the petitioner's claims on preemption grounds both in the trial court and on appeal (see A. A9 n.4). Thus pre-

emption is an issue which necessarily must be addressed in any appeal from rulings in the respondents' favor. Moreover the summary judgment ruling, from which the petitioner unquestionably appealed, restated and reincorporated the earlier preemption determination. Accordingly that issue was properly preserved.

The requirement to specify the judgment appealed from in Fed. R. App. P. 3(c) is to be liberally construed since decisions on the merits should not be avoided on the basis of mere technicalities. *Foman* v. *Davis*, 371 U.S. 178, 181 (1962). Since whether a particular order is included in a notice of appeal can be the subject of interpretation, it is different from requirements to name a party in a notice of appeal or to timely file an appropriate notice which are not subject to elucidation. *Torres* v. *Oakland Scavenger Co.*, 487 U.S. 312, 317 (1988); *Brandt* v. *Schal Associates, Inc.*, 854 F.2d, 948, 954 (7th Cir. 1988); *Birdsong* v. *Wrotenberry*, 901 F.2d 1270, 1271-1272 (5th Cir. 1990).

Courts have applied a two-part test to determine whether a party has substantially complied with the specification requirement: (1) whether the opposing party had adequate notice of the issue and (2) whether the party had an opportunity to fully brief the point. *Lynn* v. *Sheet Metal Workers International Assoc.*, 804 F. 2d 1472, 1481 (9th Cir. 1986), *aff'd*, 109 S. Ct. 639 (1989). A premature notice filed by the petitioner did include the May. 1988 preemption order and thus the respondents had notice of petitioner's intent to raise the issue (A. A6). They could not assume that any ambiguity in the second notice indicated an intent to narrow the scope of the appeal. As to the second prong of the analysis, the respondents have clearly suffered no prejudice. They were able to present an extensive argument in their brief on preemption and intended to do so as an alternate argument on the design defect claim in any event.

An evaluation of all of the circumstances, *Foman* v. *Davis*, 371 U.S. 178, 180-181 (1962), makes it clear that the petitioner intended to appeal preemption. Accordingly, the First Circuit had appellate jurisdiction to determine the issue.

REASONS FOR GRANTING THE WRIT

I. The Decision Of The First Circuit Court Of Appeals Is In Direct Conflict With Decisions Of Several State Appellate Courts

This case raises the same preemption issue as is presented to this Court in the petition for writ of certiorari in *Cipollone* v. *Liggett Group, Inc.*, (U.S. Supreme Ct. No. 90-1038) seeking review of the United States Court of Appeals for the Third Circuit decision at 893 F.2d 541 (3d Cir. 1990). As all parties in that petition agree, it is appropriate that this Court now address an issue which is a burgeoning source of conflict between federal and state courts.

The Third Circuit was the first court to address the issue of preemption in the context of tobacco litigation in the original opinion in *Cipollone* v. *Liggett Group Inc.*, 789 F.2d 181 (3d Cir. 1986), *cert. denied*, 479 U.S. 1043 (1987). The First Circuit followed closely behind with its decision in *Palmer* v. *Liggett Group, Inc.*, 825 F.2d 620 (1st Cir. 1987). Other Federal Circuit Courts have thus far followed the opinions on preemption expressed in these two seminal decisions, *Stephen* v. *American Brands, Inc.*, 825 F.2d 312 (11th Cir. 1987); *Roysdon* v. *R. J. Reynolds Tobacco Co.*, 849 F.2d 230 (6th Cir. 1988); *Pennington* v. *Vistron Corp.*, 876 F.2d 414 (5th Cir. 1989). However, two state highest appellate courts and one intermediate state appellate court have arrived at variant conclusions. *Forster* v. *R. J. Reynolds Tobacco Co.*, 437

N.W.2d 655 (Minn. 1989); *Dewey* v. *R. J. Reynolds Tobacco Co.*, 121 N.J. 69, 577 A.2d 1239 (1990); *Carlisle* v. *Philip Morris, Inc.* (Tex Ct. of Ap. 3d Dist. No. 3-89-175-CV decided February 6, 1991). Thus this case squarely presents the conflict contemplated as a consideration for grant of a writ in U.S. Sup. Ct. Rule 10(A).

The earlier First Circuit opinion raised the issue in the context of a motion for summary judgment without the development of significant evidence. Now, as counsel have defined new theories of liability and as discovery in the course of litigation has revealed the depths of tobacco manufacturer deception, state courts addressing the issue for the first time have been skeptical of the preemptive sweep dictated by the initial decisions. In this case, as in *Cipollone*, the Court was bound to follow the earlier Circuit opinion unless convinced supervising authority compelled a different result (A. A9-A10). Thus the Court did not consider the question anew in light of recent developments and analysis.

It is particularly appropriate that this Court grant certiorari in this case. The case has been fully tried and all grounds of appeal have been rejected. This petition is the last chance for the petitioner. It is time that this Court consider the serious and controversial issues posed.

II. The Continued Vitality Of The Erroneous Analysis Of The Preemption Issue Is Depriving Potential Litigants Of The Opportunity To Pursue Their Common Law Rights

It has been twenty-five years since the Labeling Act went into effect. People who started smoking at or around the time of the Act are in increasing numbers developing fatal illnesses

caused by smoking. A recent issue of a Centers for Disease Control publication, the Morbidity and Mortality Weekly Report (Vol. 40, no. 4, 2/1/91) estimated that in 1988 alone 434,175 Americans died from smoking-attributable causes. *Id.* at 70. This translates into a total of more than one million years of potential life lost (YPLL) before age 65 and nearly 10 percent of all YPLL for those dying from all causes in that year. *Id.* at 61, 70.

Those many potential litigants who may be able to prove a cause of action are being effectively foreclosed from pursuing litigation by the erroneous preemption ruling. As the trial in this case demonstrated, it is not easy to present a case based solely on activities of the tobacco companies occuring before 1966 where the habit of smoking continued for many years thereafter.

The preemption holding effectively eviscerates many potential claims. One may have started smoking before the Labeling Act but continued in the habit in part because of the addiction to cigarettes and in part because of the constant reassurances from the tobacco industry that the health risks from smoking had not been proven and that the issue remained scientifically controversial. Where all claims based upon tobacco manufacturers' attempts to minimize health risks and to deceive consumers are preempted, a plaintiff must demonstrate that either the pre-1966 smoking behavior inevitably resulted in the later development of the illness or that because of addiction, the plaintiff was unable to quit smoking. In addition, one who began smoking after 1965 is precluded from bringing a claim at all.

The recent state Court analyses of the Labeling Act demonstrate the flaws in reasoning behind the initial *Cipollone* and *Palmer* decisions. The preemption theory espoused in those cases is not based upon express preemption, comprehensive occupation of the regulatory field, or impossibility of compliance

with both federal law and potential state tort judgments. Rather they have determined that the maintenance of common law tort actions premised upon the interconnection of smoking and health "actually conflicts" with the Congressional purpose expressed in the Act, *Cipollone* v. *Liggett Group, Inc.*, 789 F.2d 181, 186-187 (3d Cir. 1986), *cert. denied*, 479 U.S. 1043 (1987), or "disturb[s] too much the congressionally declared scheme." *Palmer* v. *Liggett Group, Inc.*, 825 F.2d 620, 626 (1st Cir. 1987). The First Circuit opinions in *Palmer* and *Kotler* are founded upon this Court's recognition that in some circumstances state tort remedies can have a regulatory effect, *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236, 247 (1959). They fail to recognize, however, that in *Garmon*, as in other cases involving the National Labor Relations Act, there is a presumption in favor of preemption because of the comprehensive regulatory scheme, *Brown* v. *Hotel Employees Int'l Union*, 468 U.S. 491, 502 (1984). In a recent case this Court has distinguished the labor cases as inapposite to other regulatory schemes, *English* v. *General Electric Co.*, U.S. , 110 S.Ct. 2270, 2279 n.8 (1990).

Garmon also dealt with statutory, as opposed to common law claims. This Court has made clear that the *Garmon* holding should not be inflexibly applied "where the State has a substantial interest in regulation of the conduct at issue" and the state's interest does not unduly interfere with the federal regulatory scheme. *Farmer* v. *United Brotherhood of Carpenters*, 430 U.S. 290, 302 (1977). The protection of health and safety by means of product liability tort claims is an area traditionally of strong state concern. See *Hillsborough County* v. *Automated Medical Laboratories, Inc.*, 471 U.S. 707, 719 (1985). When Congress seeks to regulate in such an area there is a strong presumption against preemption, *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

English v. *General Electric Co.*, U.S. , 110 S.Ct. 2270 (1990) is the latest in a series of cases in which this Court has upheld the right of a litigant to pursue a state tort remedy despite asserted conflict between the potential result in the suit and a field in which Congress has preempted state regulation. *Goodyear Atomic Corp.* v. *Miller*, 486 U.S. 174, 186 (1988); *Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. 238, 256 (1984). An actual conflict between state and federal law must be more than hypothetical or potential. *Rice* v. *Norman Williams Co.*, 458 U.S. 654, 659 (1982).

The First Circuit's analysis of the Congressional purpose of the Labeling Act is also faulty. The Court asserts that the overriding goal of Congress was "to strike a fair, effective balance between [the] two competing interests" of health protection and trade protection. *Palmer* v. *Liggett Group, Inc.*, 825 F.2d 620, 626 (1st Cir. 1987). Other courts have noted, however, that the protection of commerce is subordinate to the chief purpose of the Act: to adequately inform the public of the dangers of smoking, *Dewey* v. *R. J. Reynolds Tobacco Co.*, 121 N.J. 69, 88, 577 A.2d 1239 (N.J. 1990); *Carlisle* v. *Philip Morris, Inc.*, (Tex Ct. of Ap. 3d Dist. No. 3-89-175-CV decided February 6, 1991) slip op. at 21-22. That purpose is enhanced, not diminished, by preservation of state common law tort remedies. A failure to warn claim can be based on actions of the manufacturer which unduly minimize the impact of the warning. *MacDonald* v. *Ortho Pharmaceutical Corp.*, 394 Mass. 131, 141, 475 N.E.2d 65, *cert. denied*, 474 U.S. 920 (1985). Moreover, nothing in the legislative history of the Act indicates a Congressional intent to preempt state tort litigation. See *Carlisle*, *supra* at 27-28, Comment, *Common Law Claims Challenging Adequacy of Cigarette Warnings Preempted Under the Federal Cigarette Labeling And Advertising Act of 1965*; *Cipollone* v. *Liggett Group, Inc.*, 60 St. John's L. Rev. 754, 762 n.32 (1986).

The Labeling Act does not provide any alternative remedy for those injured by tobacco manufacturer tortious conduct. An intent to deprive injured persons of any remedy for wrongful acts should not be based upon implication.

III. The Determination That The Labeling Act Preempts State Misrepresentation And Deceit Claims Establishes Unprecedented Tort Liability Protection For The Tobacco Industry

Even if state tort claims for failure to warn can be said to have too direct an effect on the labeling requirement and are thus preempted, state tort claims for misrepresentation and deceit stand on a different ground. Since these claims are based upon the knowing assertion of a falsity they do not create the same potential for conflict, *Forster* v. *R. J. Reynolds Tobacco Co.*, 437 N.W.2d 655, 660 (Minn. 1989). To avoid liability, a manufacturer need only refrain from deceptive conduct.

The First Circuit opinion in effect holds that Congress granted tobacco manufacturers a license to distort the health risks of smoking. That proposition is the antithesis of the developing concepts of product liability. Strict product liability as established in Massachusetts and in other states places the burden squarely on a manufacturer to inform consumers of all knowable risks, *Colter* v. *Barber-Greene Co.*, 403 Mass. 50, 62, 525 N.E.2d 1305, 1314 (1988), *Hayes* v. *Ariens*, 391 Mass. 407, 413, 462 N.E.2d 273, 277 (1984). If misrepresentation claims are preempted, tobacco manufacturers would therefore be entitled to deceive the public in order to vitiate the effect of the warnings. This could not reasonably have been the intent of Congress.

The Minnesota Supreme Court concluded on these grounds that Congress could not have intended the Act to be "a license

to lie" and thus held that misrepresentation claims are not preempted, *Forster* v. *R. J. Reynolds Co.*, 437 N.W.2d 655, 662 (Minn. 1989). The Chief Justice of the Massachusetts Supreme Judicial Court analyzed the same issue and arrived at the same conclusion that the Act does not encompass such a broad preemptive sweep, *Kyte* v. *Philip Morris, Inc.*, 408 Mass. 162, 177-180, 556 N.E.2d 1025 (1990) (Liacos, C.J., concurring in part and dissenting in part).[1]

Indeed, it would be particularly ironic if Congress is deemed to have awarded manufacturers of arguably the most dangerous product on the market unprecedented protection from liability and freedom to engage in deceptive marketing. Such a dramatic variance from tradition and common sense cannot be gleaned from the language of the Act.

IV. Since The First Circuit Opinion Misconstrued Controlling State Law Precedents And Evidence Presented At A Trial Involving The Previously Preempted Claims Could Alter The Jury's Evaluation Of The Claim The Petitioner Should Be Awarded A New Trial

A. The Court Erroneously Upheld The Dismissal Of The Petitioner's Risk-Utility Claims

Traditionally this Court defers to the lower federal courts on the question of the meaning of state law. *Brockett* v. *Spokane Arcades, Inc.*, 472 U.S. 491, 499-500 (1985); *Bishop* v. *Wood*, 426 U.S. 341, 356-357 (1976). However, this Court has the authority to differ where the lower court decision is plain error or clearly in conflict with state court precedent. *Brockett*, *supra*

[1] The majority opinion does not address the issue because the claims were determined on other grounds, *Kyte* v. *Philip Morris, Inc.*, 408 Mass. 162, 166-172, 556 N.E.2d 1025 (1990).

at 500. *Bishop*, *supra*, at 346-347. In this case, by affirming the dismissal of the plaintiff's design defect claims based on inherent defects and in failing to order a new trial despite finding that the trial judge erred in granting a directed verdict on the breach of warranty, the First Circuit has deprived the plaintiff of the opportunity to fairly litigate her claims.

The Court of Appeals opinion analyzed the controlling Massachusetts precedents and concluded that Massachusetts does not recognize a design defect claim unless it is premised upon evidence of an alternative safer design (A. A11-A15). That ruling is simply wrong. Analysis of Massachusetts case law demonstrates that in a proper case a risk-utility analysis is an appropriate component of strict tort liability.

In *Back* v. *Wickes Corp.*, 375 Mass. 633, 378 N.E.2d 964 (1978) the Massachusetts Supreme Judicial Court discussed as a "separate question" apart from the defectiveness of the design of the product, whether the product as designed was so unreasonably dangerous as to be unfit for use. *Id.* at 642. The Court cited specifically to the leading case on risk-utility analysis, *Barker* v. *Lull Engineering Co., Inc.*, 20 Cal. 3d 413, 573 P.2d 443 (1978). Other subsequent cases have also considered as a potential basis for liability the inherent unreasonable dangerousness posed by a product, *Killeen* v. *Harmon Grain Products, Inc.*, 11 Mass. App. Ct. 20, 413 N.E.2d 767, 771 (1980); *Uloth* v. *City Tank Corp.*, 376 Mass. 874, 384 N.E.2d 1188, 1191-1192 (1978).

In a recent Massachusetts tobacco manufacturer liability case, the plaintiff was permitted to proceed on a warranty claim based on design defect, *Kyte* v. *Philip Morris, Inc.*, 408 Mass. 162, 171, 556 N.E.2d 1025 (1990). While the plaintiff characterized the claim as one based on the defective design of the particular brands of cigarettes involved, the Court's discussion implies that a claim based on the inherent defects in all cigarettes can be posed under Massachusetts law. *Id.* at 171-172.

B. The Court Erred In Affirming The Judgment For The Respondent On Breach Of Warranty

The Court of Appeals found that the trial court judge's allowance of a directed verdict for the respondent American Tobacco Company on the breach of warranty count was based upon a misconception of Massachusetts law, a point conceded by the respondent (A. A21-A22). Nevertheless the Court upheld the ruling because in its view the instruction on negligence by the trial court fully presented to the jury the considerations relevant to breach of warranty.

The erudite analysis of this issue in the opinion is faulty for two reasons. First, the Court as it did in the previous case of *Anderson* v. *Owens-Illinois, Inc.*, 799 F.2d 1 (1st Cir. 1986) declined to follow the clear language of the Massachusetts Supreme Judicial Court concerning the extent of knowledge imputed to a manufacturer in a warranty case. In *Hayes* v. *Ariens*, 391 Mass. 407, 413, 462 N.E.2d 273, 277 (1984), the Court stated that a manufacturer is presumed to have been fully aware of all risks "regardless of the knowledge of risks that he actually had or reasonably should have had when the sale took place." *Id.* Nevertheless the First Circuit has held that there could be "no liability under Massachusetts law for failing to warn of dangers which were not known to exist in the scientific community." (A. A29.) The trial judge's instructions to the jury on the state of knowledge attributable to a manufacturer on the negligence count flatly contradicted the *Hayes* formulation.

The First Circuit recognized that even under the formulation given to Massachusetts law in the *Anderson* case, there is a difference between the state of knowledge imputed to a manufacturer in a warranty case and that present in a negligence case. The Court held, however, that the instruction as given was equivalent in that respect to what the petitioner could have obtained had the judge instructed on breach of warranty

(A. A31-A35). The flaw in this reasoning is that the trial court's instruction concerning the duty of the manufacturer was couched in terms of reasonableness. In warranty liability, culpability of the manufacturer is irrelevant. In the context of this case, the jury could well have determined that it was not unreasonable for a manufacturer to fail to warn in light of the conflicting scientific evidence existing at any particular time. However, if presented with a warranty theory, the same jury may well have concluded that since a consumer did not fully appreciate the scientifically discoverable dangers at a particular time, the manufacturer must be held liable. In Massachusetts, the issue of consumer expectations in a failure to warn case is almost always a jury question, *MacDonald* v. *Ortho Pharmaceutical Corp.*, 394 Mass. 131, 140, 475 N.E.2d 65, *cert. denied*, 474 U.S. 920 (1985).

While perhaps these issues would not merit attention from the Supreme Court in isolation, if the petitioner is permitted to proceed on the preempted claims, she should likewise be granted a new trial on the breach of warranty and design defect claims. At a new trial the petitioner would be able to present additional evidence of tobacco company misrepresentation after 1965. That evidence combined with evidence on the warning and misrepresentation claims against the other cigarette manufacturers could alter the jury's perception of the case. The petitioner should be permitted to proceed on all of her supportable claims against all three respondents in one proceeding.

CONCLUSION

For the foregoing reasons the petitioner requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit.

Respectfully submitted,

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March 19, 1991

TABLE OF CONTENTS

APPENDIX A

Order of the United States Court of Appeals for the First Circuit dated December 19, 1990 A1

APPENDIX B

Memorandum and Order of the United States District Court for the District of Massachusetts on the Motion of Defendant American Tobacco Co. for Summary Judgment dated January 12, 1990 A39

APPENDIX C

Memorandum and Order of the United States District Court for the District of Massachusetts on Motions of Liggett Group, Inc. and Philip Morris for Summary Judgment and of Philip Morris for a Protective Order dated November 21, 1989 A50

APPENDIX D

Amended Memorandum and Order of the United States District Court for the District of Massachusetts on Defendants' Motions to Dismiss and for Judgment on the Pleadings dated May 2, 1988 A54

APPENDIX E

Notice to Counsel of the United States District Court for the District of Massachusetts dated May 25, 1988 A63

APPENDIX A.

United States Court of Appeals for the First Circuit.

No. 90-1297, No. 90-1400

Joanne Kotler, Individually and as Administratrix, Etc.,
Plaintiff, Appellant,

v.

THE AMERICAN TOBACCO COMPANY, ET AL.,
Defendants, Appellees.

APPEALS FROM THE UNITED STATES DISCTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Walter Jay Skinner, *U.S. District Judge*]

Before
Campbell, *Circuit Judge*,
Coffin, *Senior Circuit Judge*,
and Selya, *Circuit Judge*.

Michael J. Traft and *Diana Lumsden*, with whom *Beverly Weinger Boorstein, P.C.*, *Gary Van Inge*, *Eric A. Nissen*, *Nissen & Lumsden*, *Alan M. Dershowitz*, *Joseph M. Lipner*, and *Cindy Leigh McAfee* were on brief for appellant.

Andrew F. Lane, with whom *Stuart T. Rossman* and *Gaston & Snow*, *Thomas E. Bezanson*, *Bruce G. Sheffler*, *Mary T. Yelenick*, and *Chadbourne & Parke* were on brief for appellee American Tobacco Co.

James V. Kearney, with whom *Webster & Sheffield*, *Samuel Adams*, *Joseph J. Leghorn*, and *Warner & Stackpole* were on brief for appellee Liggett Group, Inc.

Thomas E. Silfen, with whom *Arnold & Porter*, *Marshall Simonds*, *Thomas J. Griffin, Jr.*, and *Goodwin, Proctor & Hoar* were on brief for appellee Philip Morris, Inc.

December 19, 1990

SELYA, *Circuit Judge*. Plaintiff-appellant Joanne Kotler, individually and as administratrix, filed suit in federal district court against The American Tobacco Company (ATC), Philip Morris, Inc. (PMI) and Liggett Group, Inc. (Liggett) seeking money damages in consequence of her husband's death. Having tasted defeat below, Kotler appeals. We affirm.

I. STATEMENT OF THE CASE

Appellant's husband, George Kotler, died of lung cancer which was thought to have been caused by cigarette smoking. The decedent was born in 1931, started smoking in his youth, and thereafter regularly used Pall Malls, an ATC product, until sometime after 1965. He then switched primarily to L&Ms, a Liggett brand. After a few years, he defected to Benson & Hedges, a PMI product. In October 1984, lung cancer was diagnosed. Death followed in early 1986.

Premising jurisdiction on 28 U.S.C. § 1332 (1988) and invoking Massachusetts substantive law, the plaintiff filed a 21-count complaint (seven counts per defendant). Broadly described, the complaint proposed three theories of liability (negligence, breach of warranty, and misrepresentation), each pleaded primarily and derivately (as loss of consortium claims) against each defendant, thus accounting for 18 statements of claim. The breach of warranty claims, as pleaded, implicated both express and implied warranties and were based upon the Massachusetts version of the Uniform Commercial Code. *See* Mass. Gen. L. ch. 106, §§ 2-314 – 2-318 (1988). The last count in each grouping was for punitive damages.

Following our decision in *Palmer* v. *Liggett Group, Inc.*, 825 F.2d 620 (1st Cir. 1987), the district court dismissed substantial segments of appellant's claims. *See Kotler* v. *American Tobacco Co.*, 685 F. Supp. 15 (D. Mass. 1988) (*Kotler I*).

Appellant conceded, and the district court found, *id.* at 18, that "those . . . claims which allege inadequacy or failure to warn after January 1, 1966" were preempted by the Federal Cigarette Labeling and Advertising Act, as amended, 15 U.S.C. §§ 1331-1340 (1988) (the Labeling Act). The district court ruled, however, that preemption did not apply to matters predating January 1, 1966, *Kotler I*, 685 F. Supp. at 18 — a ruling leaving only ATC at risk in respect to such claims inasmuch as the decedent, to all intents and purposes, had smoked nothing but Pall Malls prior to 1966. The court's other rulings comprised a mixed bag; plaintiff's claims for misrepresentation and deceit, alleged to have occurred after 1965, were foreclosed, *id.* at 20, but her pre-1966 misrepresentation claims against ATC and her breach of warranty claims against all defendants, to the extent based on a design defect independent of the duty to warn, were adjudged not preempted by federal law. *Id.* at 19-20. In the district court's view, the plaintiff could make out a design defect claim by proving that the defendants' tobacco was "bad," i.e., that defendants' cigarettes contained toxic or carcinogenic ingredients in addition to natural tobacco. *Id.* at 20.

After discovery was substantially completed, Liggett and PMI each moved for summary judgment on the design defect claims. The court below, finding that Kotler had produced no evidence that the cigarettes in question were defective in a manner which went beyond the inherent characteristics of tobacco, granted the motions. *See Kotler* v. *American Tobacco Co.*, Civ. No. 86-0810-S, memorandum and order (D. Mass. Nov. 21, 1989), *reprinted in Kotler* v. *American Tobacco Co.*, 731 F. Supp. 50, 55-57 (D. Mass. 1990).[1] In roughly the same

[1] When Judge Skinner decided ATC's motion for summary judgment some seven weeks after passing upon Liggett's and PMI's motions, he attached the November 21 memorandum as an appendix to the decision. *See* 731 F. Supp. at 55-57. We refer to, and cite, these decisions, collectively, as "*Kotler II*."

time frame, ATC moved for summary judgment on all surviving causes of action. Consistent with its rulings in favor of Liggett and PMI, the district court terminated the design defect claim. *See Kotler II*, 731 F. Supp. at 51-52. The court also granted summary judgment on the misrepresentation claim because appellant tendered no evidence to show that the allegedly tortious pre-1966 advertisements and statements were either health-related or untrue. *See id.* at 52. Finally, the court rejected Kotler's effort to impose strict liability. *See id.* at 52-54. Consequently, the case was allowed to go forward only against ATC and solely in respect of the pre-1966 claims for negligence and breach of warranty. *See id.* at 54-55. Trial began on February 13, 1990 and lasted for roughly three weeks. The court granted ATC's motion for a directed verdict with regard to breach of warranty, but sent the negligence claim to the jury. A defendant's verdict ensued.

With this preface, we turn directly to the issues presented on appeal, offering further facts and details when and as necessary to place particular assignments of error into realistic perspective.

II. PREEMPTION REMAINS PREEMINENT

Appellant insists that the court below was incorrect in ruling that the Labeling Act preempted her post-1965 claims of intentional misrepresentation. In response, appellees question our jurisdiction to entertain the argument; and tell us, in any event, that no error was committed.

A. *Appellate Jurisdiction.*

Fed. R. App. P. 3(c) requires, *inter alia*, that a notice of appeal "shall designate the judgment, order or part thereof appealed from." The Supreme Court has construed Rule 3(c) as being mandatory and jurisdictional. *See Torres* v. *Oakland*

Scavenger Co., 487 U.S. 312, 315-16 (1988). Nevertheless, in holding that the failure to name a party specifically in a notice of appeal constitutes a failure of that party to appeal, the Court took pains not to overrule *Foman* v. *Davis*, 371 U.S. 178, 181 (1962). Although *Foman* held that "the requirements of the rules of procedure should be liberally construed and that 'mere technicalities' should not stand in the way of consideration of a case on its merits," the *Foman* Court was addressing the "separate provision of Rule 3(c)" requiring that the judgments or orders appealed from be designated. *Torres*, 487 U.S. at 316. Thus, while all provisions of Rule 3(c) are mandatory and jurisdictional, the level of specificity required to satisfy the different provisions varies. *Id.*

This case implicates the looser *Foman* specificity standard rather than the unyielding core standard of *Torres* itself. We are faced with the threshold issue of whether the two notices of appeal which Kotler filed sufficiently designated the lower court's preemption ruling as a subject for appellate inquiry.[2] The order in question was part and parcel of *Kotler I*, originally decided in March 1988 and entered on the docket in final form that May. Neither notice of appeal alluded specifically to the order.

We start with basics. The general rule is that "[a] mistake in designating a judgment or part of a judgment in the notice of appeal ordinarily will not result in loss of the appeal as long as the intent to appeal from a specific judgment can be fairly inferred from the notice, and appellee is not misled by the mistake." *Kelly* v. *United States*, 789 F.2d 94, 96 n.3 (1st Cir. 1986). In determining whether appellant's notices of appeal, despite their obvious failure to mention the May 1988

[2]Kotler is presently proceeding under two notices of appeal. The initial notice, filed March 29, 1990, was addressed to ATC. The later notice, filed April 24, 1990, was aimed at the other two defendants.

order, sufficiently demonstrated an intent to appeal that order, we are not limited to the four corners of the notices, but may examine them in context of the record as a whole. *See McLemore* v. *Landry*, 898 F.2d 996, 999 (5th Cir.), *cert. denied*, ___ S. Ct. ___ (1990); *FTC* v. *Hughes*, 891 F.2d 589, 590 (5th Cir. 1990); *Kruso* v. *International Tel. & Tel. Corp.*, 872 F.2d 1416, 1423 (9th Cir. 1989), *cert. denied*, 110 S. Ct. 3217 (1990); *Brandt* v. *Schal Associates, Inc.*, 854 F.2d 948, 954-55 (7th Cir. 1988).

In this case, the sufficiency of the notices of appeal is not easily proved or disproved. On the one hand, appellant's complete omission of any reference to the May 1988 order suggests abandonment of her quest; on the other hand, the papers contain intimations that appellant intended to fight the preemption ruling — indeed, in an earlier, untimely notice of appeal, now withdrawn, she mentioned it explicitly — and that appellees realized as much. While we tend to think that appellant fell short of meeting her burden in this respect, we hesitate to decide so bitterly contested a controversy by drawing conclusions about intent and reliance from an imperfectly delineated record. We take shelter instead under the familiar principle that where an appeal presents a difficult jurisdictional issue, yet the substantive merits underlying the issue are facilely resolved in favor of the party challenging jurisdiction, the jurisdictional inquiry may be avoided. *See Norton* v. *Mathews*, 427 U.S. 524, 530-32 (1976); *Secretary of the Navy* v. *Avrech*, 418 U.S. 676, 677-78 (1974) (per curiam); *In re Pioneer Ford Sales, Inc.* 729 F.2d 27, 31 (1st Cir. 1984). Because the district court's order dismissing appellant's post-1965 intentional misrepresentation claims was flawless, we leave the jurisdictional question unanswered.

B. *The Scope of Palmer Preemption.*

Giving due suzerainty to this circuit's existing precedent, appellant's post-1965 claims for intentional misrepresentation were, as the lower court ruled, plainly preempted by the Labeling Act. The Act provides:

> No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter.

15 U.S.C. § 1334(b).[3] In *Palmer*, a panel of this court concluded that, though section 1334(b) does not explicitly pretermit common law liability claims, preemption is implicit in the Act as a whole. *See Palmer*, 825 F.2d at 625. In reaching this conclusion, *Palmer* found particularly helpful the "straightforward and unambiguous" language of the Act setting forth its purpose: the balancing of "health protection" and "trade protection." *Id.* at 626. Because this equipoise was so intricately crafted, it would be "inconceivable that Congress intended to have that carefully wrought balance of national interests superseded by the views of a single state, indeed, perhaps of a single jury in a single state. . . . To permit the interposition of state common law actions into a well-defined area of federal regulation would abrogate utterly the establish scheme of health protection as tempered by trade protection." *Id.*

Appellant challenges the hegemony of *Palmer* on two grounds. First, she reads *Palmer* as not banning intentional

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[3] Prior to its amendment in 1970, this provision read: "No statement relating to smoking and health should be required in the advertising of any cigarettes which packages are labeled in conformity with the provisions of this chapter."

misrepresentation claims. Alternatively, she maintains that *Palmer* must be reconsidered in light of *English* v. *General Electric Co.*, 110 S. Ct. 2270 (1990). Neither point is persuasive.

1. *The Applicability of Palmer.* The theory underlying Kotler's misrepresentation claims was that, in the post-1965 era, the cigarette companies' purposeful misrepresentations undermined the effectiveness of the aposematic statements required by the Labeling Act. Fleshing out her claims, Kotler averred that the appellees, while promoting their products as desirable, sexy, exciting, sophisticated, and glamorous, misled people into believing that they were safe. She further alleged that the appellees knew or should have known the grave dangers of cigarette use, yet failed adequately to communicate information about these perilous effects beyond the federally mandated warnings. Instead, appellees' advertising was cleverly constructed to vitiate the efficacy of those warnings.

Palmer does not explicitly foreclose the maintenance of such an action; the only claims that *Palmer*, on its facts, held to be preempted were state-law claims of inadequate warning. *Palmer*, 825 F.2d at 629. But the *Palmer* court's reasoning, fairly read, necessarily extends to claims regarding the propriety of advertising, at least insofar as the advertising is attacked on grounds related to the interconnection between smoking and health. After all, *Palmer* characterized the federal regulatory program established by the Labeling Act as "conspicuously fail[ing] to provide *any* role for the states in the area of cigarette labeling and advertising," *id.* at 628; and, in framing the preemption inquiry, *Palmer* included the propriety of advertising as one component. *See id.* at 621. The court's analysis leads inexorably to the conclusion that when a state tort claim is based on the propriety of cigarette advertising, the claim is preempted.

Following the threads embedded in the *Palmer* tapestry erases any genuine doubt. The primary method by which the Labeling Act achieves its purpose of balancing health protection with trade protection is by requiring warnings on cigarette packaging and advertisements. If this equipoise will be set askew by state tort claims branding federally mandated warnings as inadequate, *id.* at 626, then the balance will equally be tipped by state tort claims that posit improper advertising as undermining the adequacy of federally mandated warnings. *Accord Pennington* v. *Vistron Corp.*, 876 F.2d 414, 421 n.9 (5th Cir. 1989); *Stephen* v. *American Brands, Inc.*, 825 F.2d 312, 313 (11th Cir. 1987) (per curiam); *Cipollone* v. *Liggett Group, Inc.*, 789 F.2d 181, 187 (3d Cir. 1986), *cert. denied*, 479 U.S. 1043 (1987). At bottom, appellant's misrepresentation claims are just another species of state tort claims which, like those outlawed in *Palmer*, are founded on the adequacy of, and ultimately founder upon, the federal warnings. *See Cipollone* v. *Liggett Group, Inc.*, 893 F.2d 541, 582 (3d Cir. 1990) (holding intentional misrepresentation claims to be preempted by the Labeling Act). The district court properly determined such claims, and all others "which allege post-1965 failure to warn or which otherwise necessarily depend upon a showing that the labelling or advertising used by defendants was inadequate or improper," *Kotler I*, 685 F. Supp. at 20, to be within *Palmer*'s preemptive sweep.[4]

2. *Palmer's Continuing Vitality*. We turn next to appellant's assault on the wisdom and continued vitality of *Palmer*. At the

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[4] In light of this result, we do not need to reach, and express no opinion on, the broader question of whether, fundamentally, the Labeling Act creates an indefeasible nexus between warnings and advertising whereby *any* challenge to the propriety of advertising is necessarily a challenge of the adequacy of the warnings accompanying the advertising. We also do not address appellant's pre-1965 misrepresentation claims against ATC, as appellant has not attempted to identify any error in the lower court's entry of judgment on those claims.

outset, we reiterate that panels of this circuit are bound by the decisions of prior panels unless there is supervening authority compelling a contrary result. *See Jusino* v. *Zayas*, 875 F.2d 986, 993 (1st Cir. 1989) (citing cases). Appellant argues that *English*, 110 S. Ct. 2270, handed down by the High Court after we decided *Palmer*, constitutes such a supervening precedent. We disagree.

English held that a state-law claim for intentional infliction of emotional distress was not preempted by section 210 of the Energy Reorganization Act under either an "occupation of the field" or "actual conflict" preemption analysis. The Court ruled that there was no field preemption where the claim's effect on the federal regulatory scheme would be "neither direct nor substantial enough to place [it] in the preempted field," *id.* at 2278; and that maintenance of the claim did not actually conflict with statute, *id.* at 2279-80. We are at a loss to see how these holdings call *Palmer* into legitimate question.

To be sure, the *Palmer* panels eschewed a characterization of its preemption finding as either field occupation or direct conflict, instead inquiring whether the state-law claim "disturb[ed] too much the congressionally declared scheme." *Palmer*, 825 F.2d at 626. Be that as it may, the panel necessarily engaged in the *English* inquiry of whether the challenged state-law claims directly and substantially affected the federal regulatory scheme.[5] Moreover, *English* was premised on no new doctrine, being "strongly suggested" by the Court's earlier decision in *Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. 238 (1984). *See English*, 110 S. Ct. at 2278. The *Palmer* court carefully distinguished *Silkwood* in terms of the gaping differences between the Labeling Act and the Atomic Energy Act (at

[5] It is significant in this respect that other circuits addressing the question under the Labeling Act have generally based preemption on an actual conflict analysis. *See, e.g., Roysdon* v. *R.J. Reynolds Tobacco Co.*, 849 F.2d 230, 234 (6th Cir. 1988); *Cipollone*, 789 F.2d at 186-87.

issue in *Silkwood*),[6] and relied heavily on the clear statutory language regarding preemptive intent found in the Labeling Act, determining that the asserted state-law claims threw a monkey wrench into the Act's balancing mechanism.

That the *English* Court found a totally different type of tort claim not preempted under a totally different statutory scheme sheds little or no light on the correctness of *Palmer*'s core holding. It is far more important, we suggest, that *English* and *Palmer* applied compatible legal standards. Conceptually, these cases do not conflict. We are, therefore, bound to follow our prior precedent (which is closely in point).

III. THE RISK/UTILITY INTERFACE

Appellant challenges the entry of summary judgment on her design defect claims. In gauging the district court's stewardship of Fed. R. Civ. P. 56(c), our review is plenary. *See Mack* v. *Great Atlantic and Pacific Tea Co.*, 871 F.2d 179, 181 (1st Cir. 1989). Furthermore, in elucidating state law for purposes of this diversity action, we must keep in mind that "[o]ur function is not to formulate a tenent which we, as free agents, might think wise, but to ascertain, as best we can, the rule that the state's highest tribunal would likely follow." *Porter* v. *Nutter*, 913 F.2d 37, 40-41 (1st Cir. 1990) (quoting *Kathios* v. *General Motors Corp.*, 862 F.2d 944, 949 (1st Cir. 1988)). It is not a diversity court's proper place to torture state law into strange configurations or precipitously to blaze new and unprecedented jurisprudential trails. *See id; see also Ryan* v. *Royal Ins. Co.*, 916 F.2d 731, ___ (1st Cir. 1990).

The district court considered a design defect claim not preempted by the Labeling Act if the claim was independent of

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[6] *English* involved the Energy Reorganization Act, a law closely related to the Atomic Energy Act and considerably removed from the Labeling Act.

an alleged failure to warn. *Accord Kyte* v. *Philip Morris, Inc.*, 408 Mass. 162, 556 N.E.2d 1025, 1029-30 (1990) (denying defendant's summary judgment motion inasmuch as plaintiffs' design defect "claim [was] not based on the proposition that all cigarettes are inherently defective"). It initially concluded that appellant, on the pleadings, had stated such a claim under Massachusetts law by averring that the tobacco was "bad." *Kotler I*, 685 F. Supp. at 19-20. Later on, the court granted *brevis* disposition because appellant failed to develop proof that appellees' products were defective in some way apart from their inherent characteristics; appellant, in short, had "insufficient evidence as a matter of law to show that the defendants' tobacco was not 'good tobacco.'" *Kotler II*, 731 F. Supp. at 55; *see also id.* at 51-52.

On appeal, Kotler does not harangue the district court's assessment of the evidence. Rather, she takes exception to the court's synthesis of Massachusetts law, urging that liability for a design defect is cognizable even absent any showing that the product was defective in a way above and beyond its inherent characteristics. Put succinctly, appellant's argument is that, when one balances risk against utility, cigarettes *per se* are so unreasonably dangerous as to be actionably defective.

Since Massachusetts does not recognize actions in strict liability for products, *see Mason* v. *General Motors Corp.*, 397 Mass. 183, 490 N.E.2d 437, 442 (1986), a risk/utility approach cannot be shoehorned into a strict liability espadrille. *See Mavilia* v. *Stoeger Indus.*, 574 F. Supp. 107, 109 (D. Mass. 1983). Plaintiff's argument must, therefore, stand or fall in terms of breach of warranty — a remedy intended, in Massachusetts, "to be fully as comprehensive as the strict liability theory of recovery . . . adopted by a great many other jurisdictions." *Back* v. *Wickes Corp.*, 375 Mass. 633, 378 N.E.2d 964, 968 (1978). The Massachusetts Supreme Judicial Court (SJC) has described the state's law of warranty as being "con-

gruent in nearly all respects with the principles expressed in Restatement (Second) of Torts § 402A (1965)." *Id.* at 969; *see also Hayes* v. *Ariens Co.*, 391 Mass. 407, 462 N.E.2d 273, 277 (1984).[7] The pivotal question, then, is whether, in the absence of a non-inherent defect, breach of warranty can be found based solely on a risk/utility analysis. We think this question must be answered in the negative.

Liability for breach of warranty is premised on the principle that "[t]he seller warrants that the product is 'fit for the ordinary purposes for which such goods are used.'" *Hayes*, 462 N.E.2d at 277 (quoting U.C.C. § 2-314(2)(c)). Thus, a breach of warranty can occur if either (1) the product is defectively designed, or (2) foreseeable users are not adequately warned of the dangers associated with its use. *Id.* For claims of the first type — design defect claims — Massachusetts requires a plaintiff to show that the manufacturer has breached its "duty to design products 'so that they are reasonably fit for the purposes for which they are intended.'" *Marchant* v. *Dayton Tire & Rubber Co.*, 836 F.2d 695, 698 (1st Cir. 1988) (quoting *Smith* v. *Ariens Co.*, 375 Mass. 620, 377 N.E.2d 954, 957 (1978)). This does not mean a product must be risk-free; rather, it means that any risk created must be reasonable. *See id.*

[7] Section 402A reads:

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property if

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

In this context, reasonableness is a flexible concept. To evaluate the adequacy of a product's design, the factfinder should consider, *inter alia*:

> the gravity of the danger posed by the challenged design, the likelihood that such danger would occur, the mechanical feasibility of a safer alternative design, the financial cost of an improved design, and the adverse consequences to the product and to the consumer that would result from an alternative design.

Back, 378 N.E.2d at 970 (citation omitted). Weighing these competing factors requires an inquiry essentially the same as the negligence inquiry. *See id.*

Here lies the rub. We are aware of no Massachusetts case in which liability attached in the absence of evidence that some different, arguably safer, alternative design was possible. In a design defect case premised on negligence, the existence of a safer alternative design is a *sine qua non* for the imposition of liability. *See, e.g., Colter* v. *Barber-Greene Co.*, 403 Mass. 50, 525 N.E.2d 1305, 1310-11 (1988); *Uloth* v. *City Tank Corp.*, 376 Mass. 874, 384 N.E.2d 1188, 1193 (1978). It follows, we think, that a design defect case premised on breach of warranty is, in Massachusetts, similarly dependent on proof of the existence of a safer alternative design — a design which reasonably could, or should, have been adopted. *Cf. Collins* v. *Ex-Cell-O Corp.*, 629 F. Supp. 540, 543 (D. Mass. 1986) ("the feasibility of alternative and possibly safer designs is a relevant inquiry in the warranty context" under Massachusetts law), *aff'd mem.*, 815 F.2d 691 (1st Cir. 1987).

In this case, no such proof was advanced. Appellant's design initiative rested not on the contention that appellees' cigarettes could have been made safer, but solely on the considerably

different contention that the cigarettes were defective because the risks inherent in their consumption, "good" tobacco notwithstanding, outweighed their social utility. Under the decided cases, more was required.

We decline appellant's invitation to expand Massachusetts law past its present borders and into hitherto unexplored terrain. It is illogical to say that a product is defective in its generic form when "defect" has historically been measured in reference to the availability, or at least the feasibility, of safer alternatives. As the court below noted, *Kotler II*, 731 F. Supp. at 53, the caselaw furnishes no encouragement for so venturesome a step. *Accord Viola* v. *American Brands, Inc.*, 85-2496-WD, slip op. at 2 (D. Mass. July 14, 1989); *Herlihy* v. *R.J. Reynolds Tobacco Co.*, 85-3888-MA, slip op. at 5 (D. Mass. June 27, 1988); *see also Roysdon*, 849 F.2d at 236 (defendant's cigarettes must present risks greater than those known to be associated with smoking in order to be defective under Tennessee law); Restatement (Second) of Torts, § 402A, comment (i) ("Good tobacco is not unreasonably dangerous merely because the effects of smoking may be harmful."); *cf. Kyte*, 556 N.E.2d at 1029-30. Summary judgment was appropriately granted with respect to the design defect claims.

IV. VOIR DIRE

Appellant has challenged jury selection on three grounds: (1) improper administration of peremptory challenges, (2) abuse of discretion in excusing jurors for cause, and (3) unfairness in the provision of jury lists. We find these objections meritless.

A. *Peremptory Challenges.*

In a federal civil suit, each side must be permitted three peremptory challenges. 28 U.S.C. § 1870 (1988). Neither the

statute nor the district court's local rules specify how peremptory challenges are to be administered, thus leaving the formulation of appropriate procedures to the trial judge's discretion. *See United States* v. *Morris*, 623 F.2d 145, 151 (10th Cir.), *cert. denied*, 449 U.S. 1065 (1980); *United States* v. *Haldeman*, 559 F.2d 31, 80 (D.C. Cir. 1976) (per curiam), *cert. denied*, 431 U.S. 933 (1977). The court below allowed such challenges to be cast alternately, with a replacement juror being drawn immediately upon the challenge's exercise.[8] We review what transpired.

First, the judge questioned potential jurors for bias and entertained challenges for cause. When the dust settled, six presumptively impartial jurors (Nos 49, 126, 167, 197, 209 and 245) were in the box. The panel was then exposed to peremptory challenges. The appellant struck Juror 126 who was replaced by Juror 26. ATC struck Juror 167 (replaced by Juror 188). At that juncture, appellant's attorneys passed on a further strike, stating that they were satisfied with the aggregate. ATC thereupon excluded Juror 209. The replacement juror, No. 144, was challenged by appellant. Juror 12 was seated. ATC then struck Juror 188 and Juror 308 was called.

When appellant tried to unseat this newest talesman, claiming she had not been given the opportunity to use all three of her peremptories, the court blocked the attempt on the ground that passing on the second round of strikes (appellant instead announcing her satisfaction with the provisional panel) was tantamount to waiving one challenge. Appellant's counsel did

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[8] The judge had been using the same protocol for 16 years. He described the mechanics to counsel and the venire at the outset of the voir dire's peremptory challenge stage:

> Preemptory [sic] challenges are challenges parties can make for any reason at all or for no reason. Each side has three. We will present the challenges one at a time alternately, starting with the Plaintiff. One challenge at a time.

not contest the court's reasoning; rather, asserting that they were unaware of this use-it-or-lose-it rule, they asked "the Court's indulgence that both sides be given on additional challenge just on the basis of fairness." Over ATC's objection, the court obliged. Appellant used its additional challenge to oust Juror 308. After a replacement was drawn, Juror 245 was removed by ATC. Juror 292 was then seated without objection. Once the jury of six was constituted, alternate jurors were selected (at which time additional peremptories were allotted).

On appeal, Kotler claims that it was error for the court to deem her inaction during the second round of strikes as waiving an unused peremptory challenge. The argument, essentially, is that the use-it-or-lose-it rule impermissibly denies a party the full benefit of the three peremptories allowed by statute. Alternatively, Kotler theorizes that, even if this "deemed waiver" constituted a permissible means of administering the empanelment, she was not adequately placed on notice of the practice. Because the district court granted appellant's remedial request, however, we have no occasion to dwell on these assertions. We explain briefly.

When the problem surfaced, appellant suggested a remedy — and the court granted it in full. Appellant then used her extra challenge to eliminate the unwanted venire person, Juror 308. There is nothing in the record to indicate that any seated member of the jury was unsatisfactory to appellant or that she would have employed yet another peremptory challenge, if she possessed one, to remove any other juror. Such a showing is required for reversal. *See Goldstein* v. *Kelleher*, 728 F.2d 32, 38 (1st Cir.) ("In the absence of any indication that the jury selected was unsatisfactory to plaintiff at the time chosen, we are unwilling to reverse the verdict of a jury that to all appearances was disinterested, competent and suitable."), *cert. denied*, 469 U.S. 852 (1984).

While it is true that ATC in effect acquired an extra challenge, and used it, appellant cannot belatedly assign error on this score. After the district court accepted appellant's proposed anodyne, no objection to the court's granting of an additional challenge to ATC was interposed. It is, therefore, too late for appellant to cry foul. *See Anderson* v. *Cryovac, Inc.*, 862 F.2d 910, 918 (1st Cir. 1988) (a party's "active advocacy" of a faulty procedure subsequently adopted by the judge waives the point for purposes of appeal); *Real* v. *Hogan*, 828 F.2d 58, 62 (1st Cir. 1987) (contemporaneous objection needed to preserve claim that peremptory challenges were used on a discriminatory basis); *United States* v. *Griffin*, 818 F.2d 97, 100 (1st Cir.) ("a party cannot sleep upon perceptible rights, but has an obligation to alert the district judge to error-in-the-making"), *cert. denied*, 484 U.S. 844 (1987); *United States* v. *Gonzalez Vargas*, 585 F.2d 546, 547 (1st Cir. 1978) (per curiam) (appellants proposed a certain compromise on peremptory challenges and therefore acquiesced in it). Appellant can hardly come before this court now, after an adverse jury verdict, and complain that the handling of peremptory challenges was unfair when the district court granted appellant precisely the relief that she requested.[9]

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[9] Although we do not reach the merits of this issue, we remark that appellant's challenge to the use-it-or-lose-it rule is seemingly based on dictum in *United States* v. *Turner*, 558 F.2d 535, 538 (9th Cir. 1977). The Second Circuit, in what appears to be a well-reasoned opinion, disapproved the *Turner* dictum. *See Carr* v. *Watts*, 597 F.2d 830, 832-33 (2d Cir. 1979) (per curiam) ("It is a common practice in this circuit for trial courts to specify in advance of *voir dire* that a party's failure to exercise a peremptory challenge on a particular round will result in a waiver of one challenge."). Given the broad discretion accorded trial judges in structuring the method of exercising peremptory challenges, *cf.*, *e.g.*, *Haldeman*, 559 F.2d at 80; *Gafford* v. *Star Fish & Oyster Co.*, 475 F.2d 767, 767-68 (5th Cir. 1973) (per curiam), we have little doubt that, so long as the litigants are on actual or constructive notice, the rule is permissible.

B. *Challenges for Cause.*

Our review of the empaneling shows that the trial court took great care in determining whether potential jurors could impartially evaluate evidence on the issues in the case. The court skillfully balanced the need for open-mindedness with a recognition that jurors need not come to a trial as entirely empty vessels, bereft of any sliver of an opinion touching upon the issues to be decided. *See United States* v. *Angiulo*, 897 F.2d 1169, 1182 (1st Cir.), *cert. denied*, 111 S. Ct. 130 (1990); *United States* v. *Brooklier*, 685 F.2d 1208, 1223 (9th Cir. 1982) (en banc), *cert. denied*, 459 U.S. 1206 (1983); *see also Irvin* v. *Dowd*, 366 U.S. 717, 723 (1961) ("It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.").

The single perfected objection taken by Kotler illustrates the flimsiness of her argument on this point. She urges that it was error for the trial judge, who originally indicated that all smokers would be excluded for cause, to seat a juror who smoked "a couple of cigarettes per week." The objection borders on the whimsical.[10] The juror was closely questioned about her views and the judge made a reasoned determination that her casual smoking did not make her a "smoker" in the sense that she might be partial on the issues in the case.

Appellant also berates the judge for consistently excluding those jurors who stated that their views on the relationship between smoking and lung cancer would not be changed regardless of the testimony. Passing the lack of contemporaneous objections, suitably focused, the criticism is baseless. Trial lawyers are by nature a suspicious lot and see ghosts under

[10] The fact that appellant used a peremptory challenge to remove this juror from the panel does not insulate the lower court's refusal to oust her for cause from appellate review. *See United States* v. *Rucker*, 557 F.2d 1046, 1049 (4th Cir. 1977).

virtually every bed. That is the lawyer's prerogative — but expecting the judge to credit such spectral visions asks too much. We think it fanciful to premise harmful error on the judge's decision to give credence both to jurors who stated they could be impartial on this point and to others who stated they could not. While a judge ought not blindly to accept jurors' assurances or reflexively to brush aside counsel's qualms, there must be strong evidence that the judge was hoodwinked or his judgment grossly in error before an appellate court will interfere. *See Angiulo*, 897 F.2d at 1183; *United States* v. *McNeill*, 728 F.2d 5, 10 (1st Cir. 1984).

To sum up, a trial court enjoys wide discretion in ruling on challenges for cause. *See Dennis* v. *United States*, 339 U.S. 162, 168 (1950); *Real*, 828 F.2d at 62; *Brooklier*, 685 F.2d at 1223. In the absence of manifest juror prejudice, we will not set aside a judge's actions in empaneling a jury which he reasonably considers to be suitable and impartial. *See McNeill*, 728 F.2d at 9. So here.

C. Provision of Jury Lists.

Appellant challenges the lower court's decision to grant both parties access to jury lists on the Friday before the Monday on which the empanelment took place. Appellant raised an objection to this decision at the beginning of the Monday session. The judge ascertained that neither side had made any attempt to contact potential jurors. ATC did admit, however, that its agents drove through some neighborhoods to get a better "feel" for the jurors' backgrounds.

We need not linger over this buzznacking. Appellant's argument, made without meaningful citation of authority, boils down to the notion that providing the lists was unfair not because anything improper occurred, but because ATC alone had the financial backing to make use of the jury roster. The contention is frivolous. It is rare that opposing parties have the

same wherewithal with which to pursue their causes — yet nothing in our system of jurisprudence guarantees that all litigation budgets must be equal. Trials are not rendered unfair in any cognizable sense merely because of disparity in the parties' resources. *See, e.g., Caroline T.* v. *Hudson School Dist.*, 915 F.2d 752, 757 (1st Cir. 1990) ("[t]here is no constitutional prohibition on permitting one party to employ litigation techniques which the other party cannot afford or chooses not to use, so long as those techniques are used for legitimate purposes").

V. THE DIRECTED VERDICT

The most formidable weapon in appellant's armamentarium involves the trial court's removal of an issue from jury consideration.

A. *What Transpired.*

As mentioned above, plaintiff's case went to trial only against ATC and only on the causes of action for breach of warranty and negligence stemming from failure to warn (pre-1966). During trial, the district court granted a directed verdict in ATC's favor on the warranty claim. The judge — who simultaneously refused to direct on the negligence claim — ruled that, to prevail in warranty, appellant had to prove that failure to warn was the sole proximate cause of the harm. He believed that no reasonable jury could so conclude.

Appellant argues that the instructed verdict was improperly granted because the judge imposed too great a burden on her. She importunes that Massachusetts law does not require a product to be the sole proximate cause of a plaintiff's harms in order to ground a breach of warranty suit. We concur. Under Massachusetts law, a warranty plaintiff need only prove prox-

imate cause in the ordinary sense.[11] *See, e.g., Fernandes* v. *Union Bookbinding Co.*, 400 Mass. 27, 507 N.E.2d 728, 734 (1987) (stating the proximate cause requirement for breach of warranty); *Ferragamo* v. *Massachusetts Bay Transp. Auth.*, 395 Mass. 581, 481 N.E.2d 477, 484 (1985) (allowing recovery in warranty despite fact that jury found plaintiff guilty of comparative negligence); *Barry* v. *Stop and Shop Cos.*, 24 Mass. App. Ct. 224, 507 N.E.2d 1062, 1065 (1987) (proximate cause in design defect case must be analyzed "in the customary or usual sense"). ATC, to its credit, conceded at oral argument in this court that the trial judge misperceived the law and erred in directing a verdict on this basis.

B. *The Reversible Error Standard.*

Recognition of the mistake does not end our inquiry. Ordinarily, error demands reversal only if it "affect[s] the substantial rights of the parties." Fed. R. Civ. P. 61. In this case, appellant's negligence claim was submitted to the jury and a general verdict in ATC's favor eventuated. Not surprisingly, ATC argues that the court's intervention on the warranty count, though erroneous, was inconsequential; the jury's verdict on the negligence count necessarily foretold that ATC would also have prevailed on the warranty claim. Phrased in more neutral terms, if the instructions that the jury should have received on breach of warranty were materially equivalent to, or subsumed by, the instructions actually received on negligence, then the failure to submit the warranty count to the jury was rendered

[11] In reaching a contrary (and, we think, erroneous) conclusion, the court below interpreted *Colter*, 525 N.E.2d 1305, as requiring that a plaintiff, in order to recover for breach of warranty, show that the breach was the sole proximate cause of the injuries. This is simply a misreading of *Colter*, which discusses sole proximate cause in terms of the *plaintiff's* actions, holding that if a warranty plaintiff unreasonably uses a product she knows to be defective, such unreasonable use will be deemed, as a matter of law, the sole proximate cause of the injury. *See id.* at 1314.

harmless by the verdict on the negligence count. *Cf. Allen* v. *Chance Mfg. Co.*, 873 F.2d 465, 469 (1st Cir. 1989) (error in jury instructions mandates retrial only if the error could have affected the outcome of the jury's deliberations); *Flaminio* v. *Honda Motor Co.*, 733 F.2d 463, 467-68 (7th Cir. 1984) (no error in withholding instruction which, "if given, would not have put before the jury a concept of strict liability distinct from the negligence instruction the judge did give").

C. *The Legal Framework.*

As diversity jurisdiction demands, we turn to Massachusetts law to determine if, notwithstanding its verdict on the negligence count, the jury might have found for appellant on the breach of warranty count. Because the warranty action in Massachusetts is akin to an action in strict liability in many other jurisdictions, *see Allen*, 873 F.2d at 466 n.2, we can, when we encounter hypoplasia in local decisional law, look profitably for guidance in the caselaw of these other jurdisdictions. *See Back*, 378 N.E.2d at 969 ("we find the strict liability cases of other jurisdictions to be a useful supplement to our own warranty case law"); *see also Anderson* v. *Owens-Illinois, Inc.*, 799 F.2d 1, 2 (1st Cir. 1986); *see generally Ryan*, 916 F.2d at ___ (where state law indistinct, diversity court should consider the caselaw of other jurisdictions).

As a general matter, the causes of action for negligence and breach of warranty in a Massachusetts products liability case are not identical. *See Colter*, 525 N.E.2d at 1313; *Hayes*, 462 N.E.2d at 275. Under a negligence theory, the primary focus is on the defendant's conduct. Breach of warranty, however, trains the focus mostly on the product. This difference in perspective is concretely reflected in the differing proofs a party must adduce to maintain (or defend against) claims under the two theories. In design defect cases, the difference between negligence and warranty may be especially stark, for a warranty

action can be prosecuted without inquiring into the reasonableness of the manufacturer's behavior. Put another way, so long as the product is defective, the manufacturer is liable for breach of warranty, even if the manufacturer acted reasonably, indeed, carefully, in making the product.

Of course, some cases will do double duty; if a product defect is caused by the manufacturer's negligence, there is necessarily a breach of warranty. In the last analysis, then, a manufacturer's breach of its duty of care is, *ceteris paribus*, a sufficient, although not a necessary, condition to the imposition of liability for breach of warranty. The SJC has summed it up authoritatively:

> A defendant in products liability case in this Commonwealth may be found to have breached its warranty of merchantability without have been negligent, but the reverse is not true. A defendant cannot be found to have been negligent without having breached the warranty of merchantability.

Hayes, 462 N.E.2d at 275.[12]

While the *Hayes* rule applies to failure-to-warn cases as well as to design defect cases, the distinction between negligence actions and breach of warranty actions blurs considerably when the suit emanates from an alleged omission adequately to warn of a product's dangers. *Accord Werner* v. *Upjohn Co.*, 628 F.2d 848, 858 (4th Cir. 1980), *cert. denied*, 449 U.S. 1080

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[12] It is important to note that we, like the *Hayes* court, must ask when breach of warranty can be found in the absence of producer negligence. This inquiry is less involved than its kissing cousin, which asks when liability for breach of warranty can be found in the absence of liability for negligence. The liability inquiry, unlike the breach of duty inquiry, implicates differences in the way the two theories treat affirmative defenses. *See, e.g., Colter*, 525 N.E.2d at 1313-15. That matter is not at issue in this case, as ATC did not advance any such defenses at trial.

(1981). In many instances, there is no need to treat the two theories differently at all. *See Laaperi* v. *Sears, Roebuck & Co.*, 787 F.2d 726, 728-29 n.1 (1st Cir. 1986) (describing "factual questions regarding duty to warn and causation underlying both the negligence and warranty claims" as "essentially identical"); *MacDonald* v. *Ortho Pharmaceutical Corp.*, 394 Mass. 131, 475 N.E.2d 65, 68 (similar), *cert. denied*, 474 U.S. 920 (1985). Either way, liability is premised on the existence of a similarly formulated duty to warn:

> "[A] manufacturer of a product, which the manufacturer knows or should know is dangerous by nature or is in a dangerous condition," is under a duty to give warning of those dangers to "persons who it is foreseeable will come in contact with, and consequently be endangered by, that product."

MacDonald, 475 N.E.2d at 68 (quoting *H.P. Hood & Sons, Inc.* v. *Ford Motor Co.*, 370 Mass. 69, 345 N.E.2d 683, 688 (1976)); *see also McIsaac* v. *Didriksen Fishing Corp.*, 809 F.2d 129, 133 (1st Cir. 1987) (negligence theory); *Anderson*, 799 F.2d at 4 (warranty theory). The duty to warn, whether in negligence or warranty, embraces only those dangers of which the average consumer of the product would not be aware. *See Anderson*, 799 F.2d at 4 (no warranty duty to warn of generally known dangers); *Laaperi*, 787 F.2d at 730-31 (no negligence duty to warn where users ought to realize product's dangerous condition); *Lowery* v. *Airco, Inc.*, 725 F. Supp. 82, 84 (D. Mass. 1989) (no duty to warn under either theory where danger is readily apparent).

Lest we oversimplify, we add that, although the formulation of the duty to warn is similar in both negligence and warranty,[13]

[13] In passing, we remark one temporal difference: the duty to warn under negligence continues even after the sale of the product whereas in warranty the

the inquiry into breach of the duty can be quite dissimilar. For example, where an attempt has been made to warn of a particular hazard, the jury could conceivably conclude "that, although the manufacturer was not unreasonable and hence was not negligent in the warning provided, the warning were still insufficient to render the product suitable for its foreseeable uses." *Allen*, 873 F.2d at 466 n.2. The *Allen* example is a practical illustration of the principle that negligence focuses on the manufacturer's behavior while warranty focuses on the product's characteristics. The principle creates no distinction, however, in cases, like this one, which involve not an allegedly inadequate warning, but a total failure to warn at all.[14] This is so because, given a duty to warn, an outright failure to warn is *per se* negligent, as well as being, by definition, a breach of warranty.[15]

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duty is fixed as of the time of sale. *See LaBelle* v. *McCauley Industrial Corp.*, 649 F.2d 46, 49 (1st Cir. 1981). This difference is not consequential in the present situation because it allows for negligence recovery in the absence of a warranty breach, not vice versa.

[14] Appellant's mainstay case, *Yates* v. *Norton Co.*, 403 Mass. 70, 525 N.E.2d 1317 (1988), is not to the contrary. *Yates* involved the adequacy of warnings provided with the challenged product (a varnish remover). The SJC determined that, even though the jury was fully instructed on negligence, it was error not to instruct separately on breach of warranty. *Id.* at 1320-21. This result is consistent with the *Allen* principle: when the adequacy of *provided* warnings are at issue, there is room to find breach of warranty even in the absence of negligence. In the case before us, however, there was no issue of the adequacy of provided warnings; ATC furnished no warnings at all before 1966.

[15] Given a duty to warn, a manufacturer is negligent if it does not take reasonable steps to do so. One well-respected formula defines reasonable steps as those which cost less than the product of (a) the magnitude of harm the steps would avoid, and (b) the probability of the harm arising should the preventative steps not be taken. *See United States* v. *Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947) (L. Hand, J.). Here, where the cost of producing some warning is virtually nil, *see* Note, *Strict Products Liability and the Risk-Utility Test for Design Defect: An Economic Analysis*, 84 Colum L. Rev. 2045, 2046 n.3 (1984), the failure to afford any warning at all, *if a duty exists*, is necessarily unreasonable as long as the product of (a) and (b), *ante*, is non-negligible. By contrast, where some warning is given, but it is inadequate,

We come now to the central question of whether there is any significant difference between the duty to warn under negligence as opposed to warranty. As we have seen, since the duty to warn under both theories is a function of, chiefly, what the manufacturer knows or should know about the danger necessitating the warning,[16] the two theories often seem similar. In fact, other courts have concluded that the strict liability duty to warn is so largely informed by negligence principles as to be essentially identical to the negligence duty. *See, e.g.*, *Hull* v. *Eaton Corp.*, 825 F.2d 448, 454 (D.C. Cir. 1987) (per curiam) (threshold question of duty to warn under District of Columbia law is the same in negligence and warranty cases); *Gonzalez* v. *Volvo of America Corp.*, 752 F.2d 295, 300 (7th Cir. 1985) (per curiam) ("This similarity exists because the language and concepts of reasonableness which determine unreasonable risk under Section 402A are the same concepts used in a negligence case. The principles of negligence law are particularly appropriate in Section 402A cases based on failure to warn.") (applying Indiana law); *Flaminio*, 733 F.2d at 466 ("the strict liability duty to warn, as usually formulated . . . is hard to distinguish in practice from the duty to warn imposed by a negligence standard") (applying Wisconsin law).

We pause before putting full stock in these decisions. After all, we ourselves have said that, as applied in Massachusetts, section 402A imposes a standard *higher* than due care. *See*

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unreasonableness is much more indefinite. It may be costly to determine the optimal form of a warning, and it may, therefore, be reasonable to provide a non-optimal, though inexpensive, warning. Hence — again assuming the presence of a duty — provision of the less-than-optimal warning would not constitute negligence, but would amount to a breach of warranty. *See Allen*, 873 F.2d at 466 n.2.

[16] It is true, of course, that the duty to warn is also a function of what the average consumer of the product knows. But, because the inquiry into what the average consumer knows is invariant with respect to the theory of liability, we can safely ignore this datum for the purpose at hand.

Anderson, 799 F.2d at 4 ("the seller is required to give warning against [a danger that is not generally known], if he has knowledge, or by the application of reasonable, developed human skill and foresight should have knowledge, of the presence of the ingredient and the danger") (quoting Restatement § 402A, comment j). The *Anderson* court found this standard to be more rigorous than the negligence standard of reasonable care because it imputed to the manufacturer expert knowledge rather than merely trade knowledge (that is, the level of knowledge enjoyed by a prudent manufacturer in analogous circumstances). *See id.; see also Back*, 378 N.E.2d at 970-71 (discussing, in a design defect case, the difference between imputing expert knowledge to a manufacturer on the one hand, and holding a manufacturer on the other hand to the expectable knowledge of a reasonably prudent manufacturer in like circumstances).

Having paused, we proceed. We do not find *Anderson* at odds with the conclusion of other courts that the strict liability duty to warn is essentially a negligence duty. Given a state of knowledge, both theories only impose a duty if a danger is knowable or reasonably foreseeable. *Anderson* highlighted that the state of knowledge from which the determination of "knowability" is made can differ under the two theories; the case stands for the proposition that the state of knowledge is more broadly defined in a warranty case (viz., "expert" knowledge) than in a negligence case (viz., "trade" knowledge). Be that as it may, the *Anderson* court did not purpose to hold a manufacturer to a perfectly developed state of knowledge concerning the risks of his product at all times, whether scientifically knowable or not. The upshot is that, since even expert knowledge does not rise to the level of perfectly developed knowledge, a showing must still be made that the state of knowledge supports the conclusion that a certain risk is knowable — or what the law calls "reasonably foreseeable" — in order to catalyze a cause of action under either theory.

Anderson epitomizes our point. That case involved a suit against an asbestos company. On appeal, the unsuccessful plaintiff argued that the trial court erred in allowing state-of-the-art evidence in respect to the breach of warranty claim. *Anderson*, 799 F.2d at 1-2. Massachusetts law, plaintiff said, imputed to the seller full awareness of the risks of the product at all times, *id.* at 2 — what we call above "perfectly developed" knowledge. Plaintiff placed heavy reliance on the words of the SJC:

> A defendant vendor is held to that standard regardless of the knowledge of risks that he actually had or reasonably should have had when the sale took place. The vendor is presumed to have been fully informed at the time of the sale of all risks. The state of the art is irrelevant, as is the culpability of the defendant.

Hayes, 462 N.E.2d at 277. We rejected Anderson's plaint, recognizing a state-of-the-art defense and holding that there could be no liability under Massachusetts law for failing to warn of dangers which were not known to exist in the scientific community. *See Anderson*, 799 F.2d at 3-4; *see also In re Massachusetts Asbestos Cases*, 639 F. Supp. 1, 3-5 (D. Mass. 1985) (*later proceeding, Anderson, supra*); *Collins*, 629 F. Supp. at 543. We read *Anderson* as confirming that the duty to warn in a breach of warranty action is indelibly infused with negligence principles. *Accord Moran* v. *Johns-Manville Sales Corp.*, 691 F.2d 811, 814 (6th Cir. 1982) ("duty to warn attaches, not when scientific certainty is established, but 'whenever a reasonable man would want to be informed of the risk in order to decide whether to expose himself to it'") (citation omitted) (applying Ohio law); *Borel* v. *Fibreboard Paper Products Corp.*, 493 F.2d 1076, 1088 (5th Cir. 1973) ("The requirement that the danger be reasonably foreseeable,

or scientifically discoverable, is an important limitation of the seller's [strict] liability . . . . The requirement of foreseeability coincides with the standard of due care in negligence cases in that a seller must exercise reasonable care and foresight to discover a danger in his product *and to warn users and consumers of that danger*.") (applying Texas law), *cert. denied*, 419 U.S. 869 (1974); *Basko* v. *Sterling Drug, Inc.*, 416 F.2d 417, 426 (2d Cir. 1969) (risk must be knowable or reasonably foreseeable at relevant times) (applying Connecticut law); *see also Brochu* v. *Ortho Pharmaceutical Corp.*, 642 F.2d 652, 657 n.10 (1st Cir. 1981) (negligence principles may be relevant in determining knowledge necessary to trigger duty to warn in warranty case brought under New Hampshire law).

"Knowledge" and "knowable," then, are the keys to this kingdom. When we use those terms in the present context, we signify that at a given point in time there may be vectors of information of varying magnitudes and directions regarding a particular product danger. Under a warranty theory, all of these vectors of information, so long as credibly proven, constitute the knowledge imputed to the manufacturer. Under a negligence theory, only those credibly proven vectors of information which (a) the defendant actually knows, or (b) the defendant, as a reasonably prudent manufacturer, should know, constitute the imputed knowledge. Whether a denominated danger is "knowable" is in turn a function of the particular set of imputed information vectors and is determined, under either theory, by inquiring whether, given the level of imputed knowledge, the existence of the danger was reasonably foreseeable. Accordingly, the difference in determining knowledge, not the difference in determining "knowability," is what, under *Anderson*, subjects the duty to warn to a standard higher than due care in a warranty milieu. *See In re Asbestos*, 639 F. Supp. at 3 n.4; *see also Anderson*, 799 F.2d at 2 (in warranty action, "Massachusetts law requires a seller to warn only of reasonably

foreseeable or scientifically discoverable dangers"). In the case at bar, where the manufacturer failed to warn at all of a danger and has not advanced affirmative defenses, the only relevant difference between negligence and breach of warranty would relate to the depth of knowledge that the law imputed to the manufacturer at a particular point in time.[17]

D. *Fitting the Framework to the Case.*

Against this backdrop, we turn to the record to determine whether the district court's erroneous withdrawal of the breach of warranty count from jury consideration was prejudicial. At trial, Kotler faced a formidable task to make out a prima facie case for failure to warn on either theory (negligence or breach of warranty). She had to prove, first, that ATC had a duty to warn of the dangers of cigarettes before 1966 — a burden which required her to show that at some fixed point in time ATC, but not the average consumer, knew or should have known of the potential health hazards. Once the duty to warn was established, and it was shown that no warnings were given, it still remained for appellant to prove that the failure to warn caused decedent's illness and death. The causation inquiry entailed two parts, necessitating proof that (1) ATC's cigarettes were a cause in fact of the harm, and (2) ATC's

[17] The similarity in gross of the two theories is accentuated by the fact that, at trial, appellant tried to impress upon the judge that proof of the elements of her warranty and negligence claims was much the same. For example, during the charge conference, appellant's counsel stressed that the only instruction they would have requested under the warranty count which departed from the negligence instructions would have been based on language in *Hayes* anent a manufacturer's deemed knowledge of product dangers. While not dispositive in this instance, it is worth reiterating that "we are not prone to let litigants so easily play the chameleon" by flip-flopping contentions from trial to appeal. *See Peckham* v. *Continental Casualty Ins. Co.*, 895 F.2d 830, 836 (1st Cir. 1990). Here, however, we do not invoke preclusion because the directed verdict quite possibly prevented a full and fair opportunity to limn the differences between warranty instructions and negligence instructions.

failure to warn was a proximate or "legal" cause of the injuries. *See generally Swift* v. *United States*, 866 F.2d 507, 509-10 (1st Cir. 1989) (explicating difference between actual causation and proximate causation under Massachusetts law). Each of these inquiries is the same whether done in connection with a negligence theory or a breach of warranty theory. *See Lowery*, 725 F. Supp. at 85. In addition, proof of what the average consumer knew at any set point in time is invariant with respect to the theory of liability, *see supra* note 16; and proof of what the decedent himself knew at any time is invariant, albeit germane with respect to proximate cause. *See id.* at 84-85. It is readily apparent, then, that the only relevant difference between the two theories on the facts of this case concerns the imputation of knowledge; after all, we can assume the jury's rationality — and a rational jury, to be consistent on these facts, would have to resolve all the relevant issues identically, whether under negligence or warranty, save only the issue pertaining to whether, pre-1966, the health hazards associated with smoking were knowable by ATC.

Taking all this into account, our scrutiny must be directed to those portions of the charge relating to the duty to warn. If that duty was posited in terms that met the more exacting warranty standard for imputed knowledge, then the court's failure to submit both courts to the jury was inconsequential and the verdict for the defendant necessarily betokened plaintiff's failure to establish a warranty case.[18]

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[18] Permit us to practice precision at the possible peril of perceived pedantry. The absence of warnings being conceded, and no affirmative defenses being interjected, the jury verdict in ATC's favor on the negligence count, albeit a general verdict, necessarily signified that appellant's case was wanting in one of four ways: (1) the danger was not reasonably foreseeable to defendant; (2) the danger was known equally, or better, to the average consumer (or to the decedent) than to defendant; (3) smoking Pall Malls was not an actual cause of the death; or (4) defendant's failure to warn was not a legal cause of the death. If the jury found for ATC on the second, third, or fourth point, then such

Before examining the district court's instructions on knowledge to determine if those instructions were equivalent to the instructions due a properly advised jury on breach of warranty, it seems useful to review the instruction found proper in *Anderson* respecting knowledge vis-a-vis a claimed breach of warranty for failure to warn. There, the district court charged:

> [T]he duty to warn extends only to such dangers — to such dangers or defects about which the manufacturer either actually knew or about which it reasonably should have known. Now should have known here means that a manufacturer is held to that level of knowlege which the experts in the particular industry had or in view of the state of medical and scientific knowledge in general should have had at any particular time.

Anderson, 799 F.2d at 2. We upheld that instruction and believe it is equally apposite here. Cigarettes, like asbestos, do not pose open and obvious dangers. If such dangers were unknowable at some point in time, no effective warning about them could have been given. *See id.* at 4. Ergo, if the district court were to have ceded Kotler her full entitlement and charged the jury on breach of warranty, the appropriate charge, like the one approved in *Anderson*, would have resonated the tenets embedded in Restatement § 402A (and particularly, comment j) rather than the language of the *Hayes* dictum, as plaintiff might wish.

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a finding would also, as a matter of law, foreclose any recovery in warranty. The same would not hold true on the first point *unless* the jury was in effect instructed to use the more rigorous warranty standard, *Anderson*, 799 F.2d at 4, in determining the level of knowledge imputable to ATC (and thus, the foreseeability *vel non* of the danger).

Serendipitously, the court below, purposing to discuss negligence, gave a charge that was to all intents identical to the *Anderson* charge. instructing the jury to impute expert knowledge.[19] Thus, while directing a verdict for ATC on the warranty claim, the court in effect took from ATC with the right hand what it had bestowed with the left, sending to the jury a claim fully equivalent to breach of warranty. Phrased another way, the charge as rendered, although it overstated the duty on negligence, contained all that appellant could properly have demanded on warranty. Hence, the erroneous allowance of the directed verdict was, in the end, harmless.

No different conclusion is required because the judge also instructed the jury about the manufacturer's reasonableness. A warranty instruction may contain such language when the knowledge that is imputed to the manufacturer about the existence of a danger is contradictory or uncertain, and an assessment must be made as to whether the existence of the danger was indeed "knowable." *Cf., e.g., Moran*, 691 F.2d at 814. That was precisely the case here; at trial, various experts testified about the existence of different studies at different times, discussing the possible connection between cigarettes and lung disease. The evidence presented a complex picture of conflicted, sometimes speculative, information. Against this mise-en-scene, an instruction to the effect that evaluation of this evidence centered around reasonableness was a proper statement of law, under warranty theory as well as under negligence theory.

In sum, then, the court below, on the negligence count, gave what amounted to a warranty instruction with respect to the imputation of knowledge. Since all other elements of the negligence and warranty claims were congruent, and the only meaningful distinction between the two related to the standard

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[19] We have set out the relevant portions of the charge in an appendix hereto.

for imputing knowledge, this charge ensured that the jury's finding on the negligence count accurately and inevitably foretold what would have transpired if the warranty count had also been submitted to the jury. Thus, the lower court's erroneous refusal to send the warranty claim to the jury did not deprive the plaintiff of the chance to have the factfinders consider some other or different concept which they might have resolved in a way more favorable to her. It follows inexorably that appellant's substantial rights were not prejudiced.[20] There is no cause for reversal.

VI. THE COURT'S COMMENTS

Last and least is appellant's assertion that the district court used prejudicial language when instructing the jury. In particular, appellant castigates the court for characterizing the issue of causation as complex and difficult. We find this caterwauling to comprise much ado about very little.

"The charge must, of course, be considered as a whole, not in isolated bits and pieces." *United States* v. *Cintolo*, 818 F.2d 980, 1003 (1st Cir.), *cert. denied*, 484 U.S. 913 (1987). After reviewing the entirety, we have difficulty fathoming how Kotler can seriously contend that the challenged snippets were prejudicial.[21] On any fair reading of the remarks, taken in context, the trial judge was merely offering words of obligation, telling the jurors that the causation inquiry, although labyrinthine, must nonetheless be confronted conscientiously.

[20] This result alleviates any need to pass upon ATC's alternative argument that the trial evidence was, for other reasons, insufficient to ground a verdict in plaintiff's favor.

[21] Representative of the assigned error is the following comment, made immediately after the judge outlined the causation inquiry: "I'm not suggesting that any of this is easy. But just because the case is a difficult one does not mean that you should run away from it. You are not entitled to take the easy way out sitting as jurors."

Appellant's version — that the jury would probably infer from such comments that the causation inquiry was difficult because her proof was scanty — strikes us as chimerical.

Where, as here, the judge adhered to appropriate standards of fairness and impartiality, he was not required to "function as some bloodless automaton." *United States* v. *Polito*, 856 F.2d 414, 418 (1st Cir. 1988). Having been scrupulous throughout the trial and the charge in respecting the jury's independence and domain, it was permissbile for the presider to express empathy for the jurors' plight and concern for their steadfastness of purpose. Rather than seeming a sarcastic put-down of plaintiff's case, we think it likely that the court's comments comprised a useful motivational device. At any rate, we think it certain that these comments were not "outside the bounds of proper judicial conduct." *Aggarwal* v. *Ponce School of Medicine*, 837 F.2d 17, 22 (1st Cir. 1988).

VII. CONCLUSION

We need go no further. We have carefully considered appellant's myriad objections in light of the voluminous record, the forceful briefs, the sterling arguments, and the applicable law. Finding no reversible error, we conclude that the judge below must be

Affirmed.

APPENDIX

The basic issue is one of negligence, and negligence means a failure to use due care, failure to exercise a duty of due care to someone, namely the Plaintiff; in this case, George Kotler. A manufacturer has a duty to exercise due care with respect to the people who are likely to purchase its product. It must exercise due care for their safety.

Due care is the care that a reasonably prudent manufacturer should use under the circumstances that existed at the time to avoid reasonably foreseeable injury to users of its product. Due care is to be viewed under the circumstances which exist at the time which Mr. Kotler was using this Defendant's product. Due care does not require a manufacturer to meet a standard of perfection, but it does require that the manufacturer exercise reasonable care under all of the circumstances.

The manufacturer is charged with knowledge about his product which existed at the relevant time, not with information which may later be developed. The manufacturer, however, is charged with familiarity of all the available information, from whatever source, which bears on the safety of its product. It must take, has affirmative duty, to keep abreast of responsible literature on the subject.

It doesn't mean that if there is something that appears in the National Inquirer [sic] or some such paper that the manufacturer has to bend itself all out of shape in response. But if there is legitimate, responsive information, or rather, legitimate information from responsible sources which exists in the community, which exists in the medical, scientific or industrial community, then the manufacturer is charged with familiarity with all of that information, insofar as it bears on the safety of that manufacturer's product.

The manufacturer is not an insurer of its product, but it has a duty to exercise reasonable care to warn potential users of

reasonably foreseeable hazards associated with the use of its product.

The key word here is "reasonable," and a consideration bearing on reasonableness is the seriousness of the risks that are involved, and, of course, the risk of death being more or less the ultimately serious risk. A test of reasonableness is not necessarily whether there has been conclusive evidence of the risk. If there is evidence which would induce a reasonable person to recognize the existence of a serious risk, then there is a duty on the part of the manufacturer to warn the consumer about that risk. . . .

For the plaintiff to prevail, you have to be satisfied by a preponderance of the evidence that at some time prior to January of 1966 the Defendant had information which would oblige a reasonable manufacturer to give a warning that there was enough risk, and the relationship of the level of risk — rather, the level of information to the seriousness of the risk should have prompted a reasonable manufacturer to give a warning.

Also, it must be satisfied by a preponderance of the evidence that those risks were not generally recognized in the community, and the evidence on that is a very mixed bag, as you've heard, as to what was in the papers. There was a lot of reference to the statements of people that there wasn't any risk. You could infer, I suppose, from the fact somebody is saying we dispute this risk, that somebody else was saying there was a risk.

APPENDIX B.

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

JOANNE KOTLER, Individually
and as Administratrix of the
Estate of George P. Kotler,
Plaintiff

v. CIVIL ACTION

AMERICAN TOBACCO CO. et al., NO. 86-0810-S
Defendants

MEMORANDUM AND ORDER ON THE MOTION OF
DEFENDANT AMERICAN TOBACCO CO.
FOR SUMMARY JUDGMENT

January 12, 1990

SKINNER, D.J.

In this action the plaintiff seeks to recover damages for the death of her husband from lung cancer, allegedly caused by his smoking of cigarettes manufactured by the defendants. In prior proceedings I have disposed of a number of the claims asserted in the Amended Complaint. On May 25, 1988, I dismissed all claims for failure to warn of the risks of smoking cigarettes after January 1, 1966 as having been preempted by the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. §§1331-1340, in accordance with *Palmer* v. *Liggett Group, Inc.*, 825 F.2d 620 (1st Cir. 1987). *Kotler* v. *American Tobacco*

Co., 685 F. Supp. 15 (D. Mass. 1988). I ruled that claims for breach of warranty by reason of the addition of toxic or carcinogenic substances were not preempted. Claims for failure to warn and for misrepresentation and deceit prior to January 1, 1966 also survived the motion to dismiss, but these claims apply only to the defendant American Tobacco Co., because Mr. Kotler did not smoke the products of the other defendants, Philip Morris, Inc. and Liggett Group, Inc., until after January 1, 1966. After completion of the depositions of the plaintiff's experts in the summer of 1989, Philip Morris, Inc. and Liggett Group, Inc. moved for summary judgment on the plaintiff's claim of defective design, the only remaining claim against them. On November 21, I allowed their motions for reasons stated in the memorandum annexed hereto as Appendix A.

The remaining claims against American Tobacco Co., sounding in both negligence and breach of warranty, are for failure to warn of the risks of cigarette smoking, improper design and failure to test, and false advertising leading the public to believe that there were no risks in smoking cigarettes. The defendant has moved for summary judgment on all of these claims. In cases such as this one, where the plaintiff asserts that there are genuine issues of fact, summary judgment for the defendant may be granted only if, after accepting the plaintiff's version of the contested facts and viewing all inferences therefrom in the light most favorable to the plaintiff, the court concludes that no reasonable jury could return a verdict in her favor. *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Celotex Corp.* v. *Catrett*, 477 U.S. 317 (1986); *Miller* v. *Brown & Williamson Tobacco Corp*, 679 F. Supp. 485, 487-8 (E.D. Pa.), *aff'd*, 856 F.2d 184 (3d Cir. 1988).

It is undisputed that Mr. Kotler died of lung cancer in 1986. There is evidence which would clearly warrant a finding that the lung cancer was caused by Mr. Kotler's lifelong habit of

smoking several packs of cigarettes a day, a habit which commenced in 1942, when he was eleven years old.

With respect to her claim that the defendant's cigarettes were defectively manufactured and marketed, the plaintiff has produced evidence that the defendant dusted its cigarette tobacco with a toxic pesticide called DDVP. Her experts, however, are not prepared to testify what concentration of DDVP, if any, remained in the cigarettes or whether DDVP in any likely concentration in cigarette smoke would be carcinogenic for humans. Furthermore, the plaintiff's evidence on this branch of the case is subject to the same deficiency as her evidence against the other two defendants, as described in my order of November 21. The plaintiff's experts do not ascribe any causal connection between the use of DDVP (or any other identified additive) and the death of Mr. Kotler. On the contrary, they uniformly identify the tobacco itself as the efficient cause of death. There has been more than adequate time for discovery. *Cf. Miller* v. *Brown & Williamson Tobacco Corp., supra*, at pp. 488-9. Accordingly, the defendant is entitled to summary judgment on this claim.

The evidence proffered by the plaintiff in support of her claim that the defendant misrepresented the effect of cigarette smoking on health consists of a series of advertisements concerning the defendant's product, Pall Mall cigarettes, which was the only brand that Mr. Kotler smoked before January 1, 1966. These advertisements assert that the extra length of Pall Mall cigarettes gave them a more sophisticated appearance and a cooler smoke (at least during the incineration of the extra millimeters), that the tobacco was "bulked" and that smart people smoked Pall Malls. There is no showing that these statements were either related to health or untrue. In marked contrast to some other cigarette cases, such as *Cipollone* v. *Liggett Group, Inc.*, 683 F. Supp. 1487, 1500, (D. N.J. 1988), *aff'd* in part and rev'd in part, Nos. 88-5732,

88-5770, 88-5771 and 88-5784 (3d Cir. Jan. 5, 1990) (1990 U.S. App. LEXIS 101) (1990 WL 184), and *Rogers* v. *R.J. Reynolds Tobacco Co.*, 761 S.W.2d 788 (Tex. Ct. App. 1989), *writ denied*, the plaintiff has not alleged any general conspiracy to falsely represent the facts concerning the consequences of smoking, nor has she proffered any evidence from which this defendant's involvement in such a conspiracy could be inferred.

The plaintiff persists in her assertion that under the law of Massachusetts she would be entitled to recover damages for breach of warranty on the ground that even unadulterated cigarettes are unreasonably dangerous. Liability for breach of warranty has been held to be congruent in nearly all respects with the principles of strict liability expressed in Restatement (Second) of Torts §402A (1965). *Hayes* v. *Ariens Co.*, 391 Mass. 407, 462 N.E.2d 273 (1984); *Back* v. *Wickes Corp.*, 375 Mass. 633, 378 N.E.2d 964 (1978). For liability to attach under §402A, the product must be defective and *unreasonably* dangerous:

> The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics. Good whiskey is not unreasonably dangerous merely because it will make some people drunk, and is especially dangerous to alcoholics; but bad whiskey, containing a dangerous amount of fuel oil, is unreasonably dangerous. *Good tobacco is not unreasonably dangerous merely because the effects of smoking may be harmful*; but tobacco containing something like marijuana may be unreasonably dangerous.

Gianitsis v. *American Brands, Inc.*, 685 F. Supp. 853, 856 (D. N.H. 1988), quoting (with added emphasis) from comment i to the Restatement section.

Plaintiff correctly states that the application of comment i has never been expressly decided by a Massachusetts court, but I think it is fair to say that all of the cases in which the Massachusetts courts have applied the principles of §402A have entailed evidence of a defect in the product. This would appear to be the general rule except in jurisdictions in which the courts have adopted the "risk/utility analysis," e.g., (initially) *Cipollone* v. *Liggett Group, Inc.*, 649 F. Supp. 664, 670-1 (D. N.J. 1986). This is a theory invented by Professor John W. Wade which requires the court to assess the social utility of the product in comparison to the risks attendant on its use. If the court deems the risks to be greater than the utility of the product, applying a seven part formula, the product is held to be unreasonably dangerous and the manufacturer or seller strictly liable for any harm resulting from its use. The theory was explained in some detailed by Judge Loughlin in *Gianitsis, supra*, at 857-9, who then held that this theory was not part of the law of New Hampshire, at least as applied to cigarettes. Judge Bechtle arrived at the same conclusion with respect to the law of Pennsylvania in *Miller, supra*, at 489. In *Pennington* v. *Vistron Corp.*, 876 F.2d 414, 424-5 (5th Cir. 1989), the court determined that the risk/utility theory had been adopted by the state courts of Louisiana, but refused to decide the "unsettled question" whether cigarettes were unreasonably dangerous *per se* as a matter of Louisiana law. Initially Judge Sarokin, who supports the theory, concluded that the risk/utility theory was part of the common law of New Jersey, *Cipollone, supra*, 649 F. Supp. at 670-1, but eventually reluctantly yielded to a contrary interpretation by the New Jersey legislature. *Cipollone* v. *Liggett Group, Inc.*, No. 83-2864 (D. N.J. Oct. 27, 1987) (1987 U.S. Dist. LEXIS 9936)

(1987 WL 14666). Last Friday, January 5, 1990, the Court of Appeals for the Third Circuit reversed that decision and declared that the risk/utility theory was part of the common law of New Jersey prior to the enactment of a recent statute. *Cipollone* v. *Liggett Group, Inc.*, Nos. 88-5732, 88-5770, 88-5771 and 88-5784, slip op. at 74-77 (3d Cir. Jan. 5, 1990) (1990 U..S. App. LEXIS 101) (1990 WL 184). The court held that the statute relied upon by Judge Sarokin was not a codification of the law of New Jersey, despite a legislative committee report to the contrary. See *O'Brien* v. *Muskin Corp.*, 94 N.J. 169, 463 A.2d 298 (1983). I have examined the third circuit opinion with great care to see if it offers any guidance in determining what a Massachusetts court might decide. I find none.

In my view, the risk/utility theory is a very radical doctrine which imprudently arrogates to the judicial process some very significant societal determinations. It seems to me to create more problems than it solves. For instance, is purely hedonistic consumer preference for a product to be considered a component of "utility"? If not, a very large percentage of our manufactured products will end up on the proscribed list.

I see no basis in the Massachusetts cases for assuming that this radical theory is part of the law of the commonwealth, and I am accordingly obliged to reject it. Plaintiff points out that in *Back, supra*, 378 N.E.2d at 970, the court quotes certain felicitous language from *Barker* v. *Lull Engineering Co., Inc.*, 20 Cal.3d 413, 573 P.2d 443 (1978), one of the most radical of the risk/utility cases, often cited. Various factors bearing on liability are quoted, but the reference to risk/utility analysis is notable missing. The same is true of *Colter* v. *Barber-Greene Co.*, 403 Mass. 50, 525 N.E.2d 1305, 1310 (1988). The Supreme Judicial Court has also made it clear in *Hayes, supra*, 462 N.E.2d at 278, that it has not bought the entire *Barker* package. The plaintiff's assertion that *Barker* states the law of the commonwealth with reference to risk/utility analysis is

not warranted on the bais of these references. In *Uloth* v. *City Tank Corp.*, 376 Mass. 874, 384 N.E.2d 1188, 1191 (1978), the court relies on some of the factors which are considered in a risk/utility analysis, but that case involved consideration of *negligent design* only, and has no bearing on breach of warranty (a/k/a strict liability), the issue raised by the plaintiff in this case.

Statutory history may provide a clue to whether liability for breach of warranty attaches to a product merely because of its potentially lethal effects, absent any evidence of a defect. *Mavilia* v. *Stoeger Industries*, 574 F. Supp. 107 (D. Mass. 1983). In that case Judge Garrity held that the rejection by the legislature of petitions for gun control legislation indicated that handgun manufacturers could not be held strictly liable simply because of a gun's lethal proclivities. Plaintiff attempts to distinguish the present case on the ground that the automatic pistol in that case is not lethal if used as intended, while cigarettes are potentially lethal if used as intended. In view of the fact that the principal use of an automatic pistol is to shoot people, I am not impressed with counsel's argument. Legislative history is similarly instructive in this case. Since at least 1909, Massachusetts has by statute prohibited the sale of cigarettes to persons under the age of 18, recognizing that cigarette smoking is potentially harmful. M.G.L. c. 270, §6. This statute was reconsidered and amended by the General Court in 1985, when the potentially lethal effects of tobacco were well publicized. The legislature raised the legal age for the ingestion of snuff and chewing tobacco and increased the fines, but did not prohibit sales of cigarettes to adults.

Plaintiff urges me to stay further proceedings pending decision by the Supreme Judicial Court of the case *Kyte* v. *Philip Morris, Inc.*, No. SJC-5165 (argued Dec. 7, 1989), on the ground that the issue of the application of Restatement (Second) of Torts §402A comment i to the sale of cigarettes is likely to be

resolved by the decision in that case. I have reviewed the papers filed with the SJC. The case was reported to the SJC for determination of the extent to which civil liability may be imposed upon cigarette manufacturers for violation of M.G.L. c. 270, §6, referred to above. As I understand Massachusetts procedure, the scope of appellate review is limited to the issues raised in the report. Although there is a passing reference to the Restatement in the plaintiffs' brief, the issues raised by this case are not implicated in the report and are unlikely to be reached by the SJC. Accordingly, I see no advantage in delaying a decision in the present case.

I conclude that the only claim remaining in this case is the claim that prior to 1965 the defendant had a duty to warn consumers of the carcinogenic properties of tobacco, and that its failure to do so was the cause of Mr. Kotler's death. This claim may be sustained on a theory of breach of warranty as well as on the basis of negligence. Certain elements of the claim are the same on either theory. *Wolfe* v. *Ford Motor Co.*, 6 Mass. App. 346, 376 N.E.2d 143, 150 (1978). *Cf.* Restatement (Second) of Torts §402A comment j and §388. The plaintiff must prove that the defendant knew or should have known of a dangerous characteristic of the product which was unknown to probable consumers. "But a seller is not required to warn with respect to products, or ingredients in them, which are only dangerous, or potentially so, when consumed in excessive quantity, or over a long period of time, when the danger or potentiality of danger, is generally known and recognized." §402A comment j; *Killeen* v. *Harmon Grain Products, Inc.*, 11 Mass. App. 20, 413 N.E.2d 767, 770-1 (1980). The distinctions lie in (1) the level of proof of causation required in each case, and (2) the effect of the purchaser's own conduct in establishing a defense. The breach of warranty resulting from a failure to warn must be the *sole* proximate cause of the plaintiff's injury, but negligent failure to warn need

only be a proximate cause. *Colter* v. *Barber-Greene Co.*, *supra*, 525 N.E.2d at 1312-4 (1988). Knowing and intentional use of a dangerous product with knowledge of its dangerous proclivities is a complete bar to recovery for breach of warranty, but in a negligence action the conduct of the plaintiff which will serve to bar recovery is governed by the comparative negligence statute, M.G.L. c. 231, §85. *Correia* v. *Firestone Tire & Rubber Co.*, 388 Mass. 342, 446 N.E.2d 1033 (1983); *Colter, supra*.

The defendant asserts that it is entitled to summary judgment on this branch of the case because the plaintiff's proffered evidence fails to establish any causal connection between the defendant's failure to warn and the death of Mr. Kotler. As I read it, the testimony of plaintiff's witnesses fails to establish a time at which warnings would have made any difference to Mr. Kotler or have prevented him from killing himself with cigarette smoke. (Indeed, the testimony may well have the opposite effect.) Our court of appeals has held that under Massachusetts law, there is no presumption that if an adequate warning were given it would have been read and heeded. *Vincent* v. *Louis Marx & Co., Inc.*, 874 F.2d 36, 42-3 (1st Cir. 1989), citing *Hayes* v. *Ariens Co.*, 391 Mass. 407, 462 N.E.2d 273, 278 (1984). The court relies on the following language from *Hayes*:

> Furthermore, contrary to the plaintiff's contentions, we do not read *Wolfe* v. *Ford Motor Co.*, 6 Mass. App. 346, 352, 376 N.E.2d 143 (1978), S.C., 386 Mass. 95, 434 N.E.2d 1008 (1982), or Restatement (Second) of Torts 402A comment j (1965), as favoring imposition on a defendant of the burden to prove the absence of a causal relationship between personal injuries and an inadequate warning of risk in the use of a product.

On November 29, 1989, however, the Supreme Judicial Court of Massachusetts decided that it was not error in a medical malpractice case for the trial judge to charge that "[t]he law presumes that a warning if given will be heeded," citing *Glicklich* v. *Spievack*, 16 Mass. App. 488, 493, 452 N.E.2d 287, 291 (1983), and *Wolfe, supra*, 376 N.E.2d at 147. *Harlow* v. *Chin*, No. S-4756 (Nov. 29, 1989) (1989 Mass. LEXIS 417). *Wolfe* in fact speaks of an inference which may be drawn in the absence of negating evidence. In *Glicklich* the court speaks of a presumption, but quotes the language from *Wolfe* about negating evidence. If there is a presumption, it would appear to be rebuttable. Whether what the Massachusetts courts have created is a rebuttable presumption or an inference need not be resolved at this point; either one creates an issue for the jury which mandates the denial of the defendant's motion for summary judgment and requires that the plaintiff's claim based on a failure to warn be reassigned for trial.

At trial the plaintiff will have the burden of proving the following propositions by a preponderance of the evidence:

1. Mr. Kotler's death was caused by his smoking of cigarettes manufactured by the defendant;

2. Failure of the defendant to give a proper warning of the carcinogenic character of the defendant's cigarettes was either the sole proximate cause or the proximate cause of Mr. Kotler's death, depending upon the legal theory espoused;

3. At the time during which a proper warning would have prevented Mr. Kotler's death, the carcinogenic character of its cigarettes was known or should have been known to the defendant, but was not generally known to the likely consuming public, and not known to Mr. Kotler; and

4. The plaintiff's damages.

In presenting her proof, the plaintiff shall have the benefit of the inference or rebuttable presumption described above. The defendant shall have the burden of establishing defenses based upon Mr. Kotler's own conduct.

Accordingly, the defendant's motion for summary judgment is denied with respect to the plaintiff's claim for failure to warn and allowed in all other respects.

/s/ Walter Jay Skinner
United States District Judge

APPENDIX C.

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

JOANNE KOTLER, Individually
and as Administratrix of the
Estate of George P. Kotler,
Plaintiff

v. CIVIL ACTION
NO. 86-0810-S

THE AMERICAN TOBACCO COMPANY
PHILIP MORRIS, INC. and
LIGGETT GROUP, INC.
Defendants

MEMORANDUM AND ORDER ON THE MOTIONS OF LIGGETT GROUP, INC. AND PHILIP MORRIS FOR SUMMMARY JUDGMENT AND OF PHILIP MORRIS FOR A PROTECTIVE ORDER

November 21, 1989

SKINNER, D.J.

This is an action by the surviving widow of George Kotler to recover damages for the death of her husband allegedly caused by his lifelong addiction to cigarettes. The parties have stipulated that Mr. Kotler smoked the cigarettes sold by these defendants only after 1965, the effective date of The Federal Cigarette Labelling and Advertising Act, 15 U.S.C. §§ 1331-1340. Following the decision of the court of appeals in *Palmer*

v. *Liggett Group, Inc.*, 824 F.2d 620 (1st Cir. 1988), I dismissed all of the claims against Liggett Group, Inc. and Philip Morris except the claim for defective design of the defendants' cigarettes. 685 F.Supp. 15, 19 (1988).

The defendants seek summary judgment on the grounds that plaintiff has insufficient evidence as a matter of law to show that the defendants' tobacco was not "good tobacco" within the ambit of Comment i to Section 402A of the Restatement of Torts, Second. In my opinion the defendants correctly state that under Massachusetts law the defendants can not be held liable for selling tobacco simply because of tobacco's potentially lethal effects. *See e.g., Mavilia* v. *Stoeger*, 574 F.Supp. 107 (D. Mass. 1983). I agree with the plaintiff, however, that unreasonableness of design is a jury issue, assuming there is sufficient evidence to go to a jury. *Back* v. *Wickes Corp.*, 375 Mass. 633, 378 N.E. 2d 964 (1978); *Baker* v. *Liggett Group, Inc.*, 4.2 TPLR 2.11 (D. Mass. 1988).

The plaintiff's problem is not with the choice of a legal theory, but with the dearth of any evidence to support her claim. In December 1988, in accordance with the court's scheduling order, she listed the names of four expert witnesses who would testify about the toxic effect of cigarettes. In May of 1989, plaintiff withdrew the names of these experts and substituted the names of three others, Drs. Compton, Hilgenberg and Mark. These experts have been deposed and have expressed the opinion that the guilty carcinogen in cigarettes is the tobacco itself, but if additional carcinogenic material were added to the tobacco it would make the tobacco more carcinogenic. This appears on the face of it to be an uncontestable proposition, but the plaintiff has not developed any evidence on the record of any additives to the defendants' cigarettes.

She now seeks to correct this critical deficiency by noticing the deposition of various present and former employees of Philip Morris for the purpose of developing information as to

Philip Morris's processing of tobacco. The case is scheduled for trial on January 3, 1990. The defendants seek a protective order on the ground that it is too late to start discovery on the essential predicates of the plaintiff's case six weeks before trial. The defendants would be entitled to secure expert testimony on whatever evidence was developed and the matter could drag on for another year.

The plaintiff argues that the discovery period is still open, until December 15, 1989, but this is a result of extensions granted only for a particular purpose. Discovery was orginally scheduled to close on May 31, 1989. On motions of the plaintiff, this deadline was twice extended on the plaintiff's assertion that there were scheduling difficulties in the taking of depositions of the plaintiff's new array of experts, and for no other reason.

At oral argument I thrice asked plaintiff's counsel for an explanation of the delay. I received no satisfactory answer. The defendants' position on § 402A of the Restatement and Comment i has been known since they filed motions to dismiss at the outset of the case. The precise parameters of the plaintiff's burden of proof has been known since my order of May 25, 1988. I am sympathetic with the problems of a small law office attempting to mount a major products liability case against large corporations and their batteries of lawyers[1], but there is no evidence in this case of any attempt by the defendants to frustrate plaintiff's discovery up to this point. No discovery has been attempted. There is no reason why the six depositions could not have been called for in November 1988 as easily as in November 1989.

Clearly the courts have a duty to permit parties a reasonable opportunity to prepare and present their cases. There is a concomitant duty to bring these cases to some form of closure

[1] I am aware, however, of solo practitioners who have successfully sued the largest corporations.

within a reasonable time, and the trial judge is expected to schedule and monitor the progress of each case. Fed. R. Civ. P. 16(b). In this case plaintiff has simply ignored a reasonable schedule (the case is over three years old) and now seeks to initiate her basic research on the eve of trial. In my view this would be impermissible subversion of the court's scheduling obligation and should not be permitted.

Accordingly, the defendants' motion for a protective order is ALLOWED and the scheduled depositions shall not be taken. Similarly, the defendants need not answer the plaintiff's requests for admissions, since they are an aspect of discovery which was not included in the extensions of the discovery deadline.

I have given serious consideration to the motions for summary judgment because I am reluctant to terminate a case without trial when there is any possibility that the claim is meritorious. However, the one avenue of liability in this case has been ignored by plaintiff up to the eve of trial. It is apparent that the only case counsel has prepared is based on the inherent hazards of tobacco. It follows from my allowance of the protective order that plaintiff will not have sufficient evidence to go to the jury on the present state of the record.

Accordingly, the summary judgment motions of Philip Morris and Liggett Group, Inc. are ALLOWED.

/s/ Walter Jay Skinner
United States District Judge

APPENDIX D.

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

JOANNE KOTLER, Individually
and as the Administratrix of the
Estate of George P. Kotler,
Plaintiff,

v. CIVIL ACTION
NO. 86-0810-S

THE AMERICAN TOBACCO COMPANY
PHILIP MORRIS, INC. and
LIGGETT GROUP, INC.,
Defendants

AMENDED MEMORANDUM AND ORDER ON
DEFENDANTS' MOTIONS TO DISMISS
AND FOR JUDGMENT ON THE PLEADINGS

May 2, 1988

SKINNER, D.J.

Plaintiff Joanne Kotler, individually and as administratrix of the estate of her husband, George P. Kotler, brought this tobacco products liability action against defendants American Tobacco Company (Division of American Brands, Inc.), Philip Morris, Inc., and Liggett Group, Inc. Plaintiff claims that her husband contracted lung cancer and died as a result of smoking cigarettes manufactured by defendants. The complaint charges each defendant with negligence, breach of warranty, and negligent misrepresentation and deceit.

Following *Palmer* v. *Liggett Group, Inc.*, 825 F.2d 620 (1st Cir. 1987), I held a hearing on October 5, 1987 to question the effect of *Palmer* on this case. Pursuant to a scheduling order, all three defendants have moved in effect to dismiss for failure to state a claim upon which relief can be granted, Fed.R.Civ.P. 12(b)(6), although Liggett Group has titled its pleading a motion for judgment on the pleadings, Fed.R.Civ.P. 12(c).[1] For reasons set forth in this opinion, defendants' motions are allowed in part and denied in part.

Background

Plaintiff filed the action on March 6, 1986 claiming that defendants were liable to plaintiff for manufacturing cigarettes which allegedly caused her husband to develop lung cancer. Counts I, VIII, and XV claim that plaintiff's decedent started smoking defendants' cigarettes as a proximate result of aggressive and negligently designed advertising campaigns, that defendants negligently failed to warn or adequately warn of the dangers of their cigarettes, that defendants knew or should have known with the exercise of reasonable care of their products' dangers, and that defendants negligently failed to adequately test, design, market, distribute and sell their products. Counts II, IX, and XVI claim that defendants warranted that the cigarettes purchased and smoked by the decedent were safe, merchantable, and fit for the use for which they were intended, that plaintiff's decedent relied on these warranties, and that defendants breached their express and implied warranties by selling cigarettes which were defective and whose risk outweighted their utility. Counts III, X, and XVII claim that defendants negligently or intentionally misrepresented the

[1] A motion by a defendant for judgment on the pleadings should be treated as a motion to dismiss for failure to state a claim upon which relief can be granted, *see generally*, 2A *Moore's Federal Practice* ¶ 12.15 (2d ed. 1987).

qualities and detrimental effects of cigarette smoking through their failure to provide warnings or adequate warnings and through their diverse marketing and advertising efforts, and the plaintiff's decedent detrimentally relied on these representations. The remaining counts are for loss of consortium and for punitive damages.

Defendants each answered, generally denying all substantive claims and asserting the affirmative defense, *inter alia*, that all of plaintiff's claims are barred by the Supremacy Clause and are preempted by the Federal Cigarette Labelling and Advertising Act, as amended, 15 U.S.C. §§ 1331-1340 (the "Act"). Subsequently, our Court of Appeals decided *Palmer, supra*.

In *Palmer*, the court narrowly framed the issue as whether the Act preempted plaintiff's smoking and health related claims that challenged either the adequacy of the federal warning on cigarette packages or the propriety of the defendant's advertising and promotion of cigarettes. The district court and both parties agreed that determination of the Act's preemptive effect controlled the disposition of virtually the entire case. The court held that the Act impliedly but not expressly preempted the Palmers' claims.

The court recognized that Congress explicitly announced a twofold purpose when it adopted the Act. The Act embodied an educational purpose which sought to inform the public of the hazards of cigarette smoking. 15 U.S.C. § 1331(1). This purpose was to be balanced by a trade protection policy that protected commerce and the national economy to the maximum extent possible. 15 U.S.C. § 1331(2). The court focused on the proper balance between these competing policies, and concluded that an action for damages on a common law theory of inadequate warning impermissibly disrupted the balance of purposes set by Congress and was thus preempted. *Id.*, at 626.

Defendants each base their motions on essentially the same grounds: first, that in accordance with *Palmer*, all claims which necessarily depend on an assertion that the warnings were inadequate or which question the propriety of the advertisement and promotion of cigarettes are preempted, and second, that each of plaintiff's claims requires proof that the cigarettes were "unreasonably dangerous" when sold, and that as a matter of Massachusetts law, this cannot be proved. *Back* v. *Wickes Corp.*, 378 N.E.2d 964 (Mass. 1978); Restatement (2d) of Torts § 402A comment i (1965).

Discussion

The preemption provision of the Act, 15 U.S.C. § 1334(b), states that "No requirement or prohibition based on smoking or health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labelled in conformity with the provisions of this chapter." *Palmer* narrowly limited the preemptive effect of this provision to those claims which challenged the adequacy of the warnings and the propriety of Liggett's advertising and promotion of cigarettes. Subsequently, Judge Mazzone entered judgment for the defendants and dismissed the entire complaint.

Unlike the plaintiff in *Palmer*, Kotler correctly asserts that the preemptive effect of the Act does not necessarily result in dismissal of virtually the entire case. *Palmer* did not decide that Congress intended to supersede all private rights of action when it passed the Act, not did the court declare that the overall scheme created by Congress was so pervasive as to eradicate all of the Palmers' claims. Because of the narrowness of the court's holding, the effect of *Palmer* on plaintiff's claims for pre-1965 failure to warn, post-1965 failure to warn, design defect, and negligent misrepresentation or deceit must be discretely analyzed.

Pre-1965 Failure to Warn

The Act took effect on January 1, 1966. Prior to this date, plaintiff's decedent smoked only cigarettes manufactured by American Tobacco. American Tobacco contends that since the *Palmer* complaint was based on both pre- and post-1965 smoking, and since the court did not distinguish between those two periods when it declared that certain of plaintiff's state claims were preempted, the preemptive effect of the Act should extend to plaintiff's entire claim. American Tobacco's argument is unpersuasive for several reasons.

First, the Act does not provide for retroactive preemptive effect. Generally, retroactive operation will not be given to a statute unless the act clearly, by express and unequivocal language or necessary implication, indicates that the legislature intended a retroactive application. *United States* v. *Security Industrial Bank*, 459 U.S. 70, 79, 103 S.Ct. 407, ___, 74 L.Ed.2d 235, ___ (1982). *See generally*, 2 C. Sands, Sutherland on Statutory Construction § 41.04 (4th Ed. 1972, Supp. 1986). There is no language in the Act that even hints at retroactive application, and it surely is not necessary to give the Act retroactive application in order to give it full force or effect.

Second, the court's failure in *Palmer* expressly to distinguish between preemption of pre-1965 and post-1965 failure to warn claims does not compel the result that American Tobacco favors. The court of appeals appears to have relied on the consensus between the plaintiffs, defendants and the trial judge that the preemptive force of the Act controlled disposition of "virtually the entire case," *Palmer*, 825 F.2d at 622. There is no consensus between the parties to this action, and I conclude the proper interpretation of the Act is to allow plaintiff to pursue her claim for failure to warn prior to January 1, 1966.

Accord, Cipollone v. *Liggett Group, Inc.*, 649 F.Supp. 664, 668 (D. N.J. 1986).[2]

Post-1965 Failure to Warn

Palmer dictates that those portions of plaintiff's claims which allege inadequacy or failure to warn after January 1, 1966 be dismissed for failure to state a claim upon which relief can be granted due to the preemptive effect of the Act. Plaintiff concedes this, and no further discussion is necessary.

Design Defect

The cornerstone of plaintiff's opposition to these motions is that *Palmer* does not render tobacco manufacturers immune from liability on other grounds which do not depend on challenging the adequacy or propriety of warnings or labelling or any other advertising or promotional materials. Plaintiff has charged that the cigarettes were defectively designed and breached and implied warranty of merchantability. Defendants counter that plaintiff cannot prove any of these allegations as a matter of law.

Massachusetts courts recognize claims for defective design as independent of claims for failure to warn. Whether adequate warnings are given with respect to use of a product is one factor to be considered in design defect cases, but warnings alone cannot absolve the manufacturer or designer of all responsibility for the negligent design of a product. *Uloth* v. *City Tank Corp.*, 384 N.E.2d 1188, 1192 (Mass. 1978). In a products liability case, furthermore, defendants cannot be found to have negligently designed their cigarettes without having

[2] American Tobacco raised the statute of limitations as an affirmative defense in its answer, but has not argued this ground in its motion to dismiss. Applicability of statutes of limitations in tobacco liability actions usually involves questions of fact for a jury, and American Tobacco will bear the burden of establishing as a matter of law that the challenged claims are barred. *Gunsalus* v. *Celotex Corp.*, 674 F.Supp. 1149, 1152 (E.D. Pa. 1987); *see also R. J. Reynolds Tobacco Co.* v. *Hudson*, 314 F.2d 776 (5th Cir. 1963).

breached the warranty of merchantability. *Hayes* v. *Ariens Co.*, 462 N.E.2d 273, 275 (Mass. 1984) (a defendant in a products liability case in this Commonwealth may be found to have breached its warranty of merchantability without having been negligent, but the reverse is not true).

Liability for breach of warranty is governed by the Massachusetts version of the Uniform Commercial Code, M.G.L. c. 106, §§ 2-314 — 2-318, and is congruent in nearly all respects with the principles expressed in Restatement (Second) of Torts § 402A (1965). *Hayes*, 462 N.E.2d at 277.[3] *See also Back, supra; Correia* v. *Firestone Tire & Rubber Co.*, 446 N.E.2d 1033 (Mass. 1983). M.G.L. c. 106, § 2-314(2)(c) provides that "goods to be merchantable must at least be such as are fit for the ordinary purposes for which such goods are used." Under Massachusetts law, questions of fitness for ordinary purposes are largely centered around "reasonable consumer expectations." *Back*, 378 N.E.2d at 970; *Venezia* v. *Miller Brewing Co.*, 626 F.2d 188 (1st Cir. 1980). The "ordinary purposes" contemplated by § 2-314(2)(c) include both those uses which the manufacturer intended and those which are reasonably foreseeable. *Back*, 378 N.E.2d at 969; *Venezia*,

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[3] Section 402A provides:

> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
>
> (a) the seller is engaged in the business of selling such a product, and
>
> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
>
> (2) The rule stated in Subsection (1) applies although
>
> (a) the seller has exercised all possible care in the preparation and sale of his product, and
>
> (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

626 F.2d at 190. The overall focus in negligent design cases is not on how the product is meant to function, but on whether the product is designed with reasonable care to eliminate avoidable dangers. *Uloth*, 384 N.E.2d at 1191 (product may be negligently designed even though it functions as intended if design changes would have reduced the danger of the product without significant reduction in its efficiency and without undue cost). At the very least, plaintiff must demonstrate that the commodity was not reasonably suitable for ordinary uses for which goods of that kind and description are sold. *Walsh* v. *Atamian Motors, Inc.*, 406 N.E.2d 733 (Mass.App. 1980).

Defendants argue that plaintiff's negligence and warranty claims for design defect fail to state a claim because Massachusetts law requires proof that the product was "unreasonably dangerous" when sold, and that as this term has been construed under section 402A of the Restatement, plaintiff is forestalled from making this showing. *See, e.g., Mavilia* v. *Stoeger*, 574 F.Supp. 107 (D. Mass. 1983). Defendants rely on comment i to §402A, which states in relevant part, "[g]ood tobacco is not unreasonably dangerous merely because the effects of smoking may be harmful." The flaw in defendants' argument, however, is that whether the tobacco in cigarettes purchased and smoked by plaintiff's decedent was "good" is a disputed question of fact in this action. Plaintiff alleges that the cigarettes were inadequately tested and designed, and that they contained toxic or carcinogenic ingredients. Plaintiff has sufficiently pleaded that the tobacco was "bad". Other courts have held that cigarettes may be found to be "bad" if the tobacco contains pesticide residues, which might conceivable result from inadequate testing, *see, Horton, el al.* v. *American Tobacco Co.*, 2.9 TPLR 3.583 (1987) (affidavit of Walter W. Dickerson), or if they contain excess nicotine or additives which may affect their safety. *Cf. American Tobacco Company* v. *Horton, et al.*, 2.5 TPLR 2.76, 2.79 (S.Ct. Miss. 1987); *Shires* v.

Celotex Corp., 2.8 TPLR 2.159 (E.D. Pa. 1987). This is an issue of material fact which cannot be determined on a motion to dismiss.

Negligent Misrepresentation or Deceit

Plaintiff's claims for negligent misrepresentation or deceit are admittedly founded on the premise that the labelling on defendants' cigarette packages and the advertisements used to promote the sale and consumption of their cigarettes were either inadequate or intentionally misleading. *Palmer* holds that these claims are preempted by the Act, but only with respect to conduct occurring after December 31, 1965.

Conclusion

For the foregoing reasons, defendants' motions to dismiss are ALLOWED as to those portions of Counts I, II, III, VIII, IX, XV, and XVI which allege post-1965 failure to warn or which otherwise necessarily depend upon a showing that the labelling or advertising used by defendants was inadequate or improper, ALLOWED as to those portions of IV, V, VII, XI, XII, XIV, XVIII, XIX, and XXI which derive therefrom, ALLOWED as to Counts VI, X, XIII, XVII, and XX, and DENIED in all other respects.

/s/ Walter Jay Skinner
United States District Judge

APPENDIX E.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

JOANNE KOTLER, Individually
and as the Administratrix of the
Estate of George P. Kotler,
Plaintiff,

v. CIVIL ACTION
NO. 86-0810-S

THE AMERICAN TOBACCO COMPANY
PHILIP MORRIS, INC. and
LIGGETT GROUP, INC.,
Defendants

NOTICE TO COUNSEL

May 25, 1988

SKINNER, D.J.

Lest there be any confusion about the critical date that the preemptive effect of the Federal Cigarette Labelling and Advertising Act commences, the following changes in my May 2, 1988 amended memorandum and order should be noted:

page 5, line 19	"pre-1965" should read "pre-1966"
page 6, heading	"Pre-1965 Failure to Warn should read "Pre-1966 Failure to Warn"
page 6, line 4	"pre-" should read "pre-1966"
page 6, line 22	"pre-1965" should read "pre-1966"

/s/ Walter Jay Skinner
United States District Judge